TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1922

No. 653. 229

OMNIA COMMERCIAL COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 19, 1921.

(28,608)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1921.

1 In the Court of Claims of the United States.

No. 197-A.

OMNIA COMMERCIAL COMPANY, INCORPORATED, Plaintiff,

vs.

THE UNITED STATES, Defendants.

I. *Petition.*

(Filed June 15, 1921.)

To the Honorable the Chief Justice and Justices of the Court of Claims:

Comes now the plaintiff in the above entitled cause and for its cause of action alleges as follows:

The plaintiff is a corporation created and doing business under the laws of the State of New York, with its principal place of business in the City of New York in said State. The plaintiff's business has been the purchase, manufacture and sale of steel suitable for the uses to which steel and steel products may be put, but particularly the purchase and sale of steel and steel products suitable for ship and tank construction. The plaintiff corporation was one of two corporations created and employed as vehicles of convenience for the more readily carrying out of the purposes and transactions of the five associates hereinafter named.

2 The sole stockholders, directors and officers of the plaintiff corporation are Robert P. Tucker, Charles Dammen, Charles B. Eddy, Jacob Meurer and Ralph R. Watney, all loyal citizens of the United States and yielding allegiance to their government. These individuals have been associated together from the outset of the enterprise which gave rise to the rights subsequently transferred to this plaintiff and which rights are the basis of the cause of action herein stated.

These five associated individuals last named, who subsequently became the sole stockholders of the petitioning corporations, began in the latter part of the year 1915, an investigation of the practicability of erecting and operating a plant for the manufacture of steel plate. As the result of an exhaustive and expensive study, they finally decided to erect such a plant at Chattanooga, Tennessee.

In furtherance of this decision, the said associates purchased the most modern 34-inch blooming mill which money could buy. This they arranged to convert into a 108-inch plate mill. In addition they secured: the electrical equipment for the driving of such a mill, including a 6,000 horsepower reversible electric motor, etc.; the structural steel for the erection of the intended plant; contracts for erection of the plant, contracts for material for furnaces, contracts

for cranes, contracts for power and many other minor contracts; and finally, one hundred (100) acres of land with valuable water and rail rights upon which land they spent great sums in the installation of drainage, erecting wharf buildings, grading, road making, etc. Also the said associates had selected a skeleton organization of operating foremen and superintendents and so great progress had been made that an equal stage of development with deliveries of similar machinery could not have been achieved in two full years.

3 Early in 1917, after all the said machinery had been assembled at Chattanooga and construction work was in progress, the five associates aforesaid, upon considering the fact that there was a threatened shortage of labor and material, which would probably delay the completion of their plant, and upon considering the fact that the price of finished steel plate had attained an unprecedented figure, concluded to sell said machinery and equipment to an established and going concern and to accept the purchase money therefor in steel plate for quick delivery, knowing that the plate could be disposed of on the then market readily and at almost any price which might be demanded for it. Accordingly, they entered into negotiations with the offers of the Allegheny Steel Company, a corporation with its principal offices at Pittsburgh, Pennsylvania. These negotiations extended over a period of some months, and finally resulted in the sale to the said officers, acting on behalf of the said Allegheny Steel Company, of all said machinery and equipment at a price which was then and there agreed between the said associates and the said officers of the said Allegheny Steel Company to be approximately Three Million, Seven Hundred and Five Thousand Dollars ($3,705,000), to be paid as follows: Five Hundred Thousand Dollars ($500,000) in cash and the remainder in Fifty-eight Thousand (58,000) tons of finished steel plate to be delivered to the associates, or their assigns, in equal monthly installments during the year 1918, at a price of Three Million, Two Hundred and Five Thousand Dollars ($3,205,000) below the minimum market value of said plate.

In other words, it was agreed that in consideration of the transfer to the said officers of the said Allegheny Steel Company, acting as agents for that company, by the said associates of their machinery, equipment and other properties, the said Allegheny Steel Company

4 should be obligated to deliver to the said associates, or their assigns, the entire expected steel plate production of the said Allegheny Steel Company in the year 1918, and the said Allegheny Steel Company should be obligated to credit the said associates with Three Million, Two Hundred and Five Thousand Dollars ($3,205,000) on the purchase price of the steel plate expected to be produced by that company in the year 1918.

Sometime after the making of the agreement last described, contracts were made in writing between the parties with the object of achieving the purposes of the said agreement. Copies of these contracts are hereto attached as Exhibits I to III, inclusive, and Exhibits IV and V and are made a part hereof as completely as tho set out in full at this point.

After the making of the said agreement hereinbefore first described between the said associates and the said officers and agents of the Allegheny Steel Company, and on the nineteenth day of May, 1917, the said five associates transferred for a proper and lawful consideration to the plaintiff corporation, of which the said associates, were, and are, exclusively the stockholders, directors and officers, all the right, title and interest which the said associates as individuals had in and to the contract set out in Exhibits I, II and III, hereto attached and made a part hereof, i. e., the right to purchase from the said Allegheny Steel Company, Eighteen Thousand (18,000) tons of steel ship plate at Six and One quarter cents (6¼c.) per pound for delivery in equal monthly installments during the year 1918. Said transfer and assignment to the plaintiff was made with the full knowledge, consent and approval of the said officers and agents of the said Allegheny Steel Company.

The plaintiff corporation having received by assignment from the said associates all their right, title and interest in the contract set out in Exhibits I to III, inclusive, hereto attached and made
5 a part hereof, it was determined between the plaintiff and the said Allegheny Steel Company that this obligation should be reduced to a direct obligation between the plaintiff and said company. Accordingly, the plaintiff then entered into a direct written contract with the said Allegheny Steel Company for the purchase from the latter of Eighteen Thousand (18,000) tons of steel ship plate, said agreement taking the place of, and being substituted for, the rights of the parties which had arisen under the contract set out in Exhibit I to II inclusive, hereto attached and made a part hereof. This direct agreement between the plaintiff and the said Allegheny Steel Company was committed to writing and executed by the parties hereto on the twenty third day of August, 1917. A true copy of this contract is hereto attached as Exhibit VI and made a part hereof as completely as tho set out in full at this point.

Pursuant to its obligation under the contract, set out in Exhibits I, II and III, hereto attached and made a part hereof, transferred to it by the associates as hereinbefore described and under its direct obligation as set out in Exhibit VI, hereto attached and made a part hereof, to provide letters of credit in favor of the said Allegheny Steel Company, for at least One Million Dollars ($1,000,000), the plaintiff actually did provide letters of credit, in excess of Two Million, Three Hundred and Seventy Thousand Dollars ($2,370,000) issued by the Empire Trust Company of New York City. As a result of the posting by the plaintiff of these letters of credit, the said Allegheny Steel Company was enabled to procure, and did purchase, the raw materials necessary to perform its said contract with the plaintiff.

Directly after the transfer to the plaintiff by the said associates as hereinbefore described, of the rights under the contract set out in Exhibits I, II and III, hereto attached and made a part hereof, the plaintiff sold, by written contract of sale, to the Vulcan Steel
6 Products Company, a corporation with its principal offices in the City of New York, State of New York, all of the Eighteen

Thousand (18,000) tons of steel ship plate purchased by the plaintiff under the terms of the contract set out in Exhibits I, II and III, hereto attached and made a part hereof, from the said Allegheny Steel Company. A true copy of said contract of sale between the plaintiff and the said Vulcan Steel Products Company is set forth in Exhibit VII, which is hereto attached and made a part hereof as completely as tho set out in full at this point. By the terms of this contract the said Vulcan Steel Products Company was obligated to post certain letters of credit. The Vulcan Steel Products Company met this obligation and such letters of credit in excess of Two Million, Three Hundred Thousand Dollars ($2,300,000) actually were satisfactorily posted by the said Vulcan Steel Products Company in due and proper season for the performance of the contract.

The plaintiff further alleges for its cause of action that while it was fully possessed of all the right, title and property hereinbefore described, vested in it by reason of its contract, set out in Exhibit VI, hereto attached and made a part hereof, with the Allegheny Steel Company, a corporation of Pittsburgh, Pennsylvania, by which the said Allegheny Steel Company was obligated to manufacture and deliver to the plaintiff Eighteen Thousand (18,000) tons of steel plate in equal monthly installments during the year of 1918, that the defendants, through one of their agents for the purpose, i. e., one J. Leonard Replogle, Director of Steel Supply of the War Industries Board of the United States Government, well knowing and admitting the right, title and property of the plaintiff in its contract, herein set out in Exhibit VI, attached hereto and made a part hereof with the said Allegheny Steel Company and before any deliveries had been made under said contract, in the month of September, 1917, notified the said Allegheny Steel Company that they, the defendants, required for public use the steel plate production capacity of the said Allegheny Steel Company for the year 1918 and demanded that the Allegheny Steel Company refuse to comply with its contract (Exhibit VI) with the plaintiff; and that no offer of compensation was made by the defendants to the plaintiff for this taking of its private property for the public use.

The plaintiff further alleges for its cause of action; that in the month of October, 1917, the defendants by one of their agents for the purpose, one J. Leonard Replogle, Director of Steel Supply of the War Industries Board of the United States Government, well knowing and admitting the right, title and property of the plaintiff in its contract, herein set out in Exhibit VI, attached hereto and made a part hereof, with the Allegheny Steel Company, a corporation of Pittsburgh, Pennsylvania, and before any deliveries had been made under said contract commanded the said Allegheny Steel Company to cease all preparation for the performance of its contract with the plaintiff; that the defendants by their said agent declared to the president of the said Allegheny Steel Company that if the said Allegheny Steel Company attempted to follow out its contract with the plaintiff that the defendants would confiscate the entire plant of the Allegheny Steel Company and would operate it for the public use; that the defendants ordered the said Allegheny Steel Company

to fill only such orders as would be given it by the defendants and to hold its plant production capacity for the year 1918 at the complete and absolute disposal of the defendants; that the defendants thereby took for the public use the raw materials in the possession of the said Allegheny Steel Company, which materials were purchased by means of the letters of credit posted by the plain-
8 tiff under the terms of its contract aforesaid (Exhibit VI) with the said Allegheny Steel Company and were purchased solely for the performance of said contract; that the defendants by such orders and commands rendered unlawful and impossible the performance of the contract of the said Allegheny Steel Company with the plaintiff; that the defendants by such orders and acts took for the public use the right of priority in the plaintiff to the steel plate expected to be produced by the Allegheny Steel Company in the year 1918; that the defendants by such orders and acts took for public use the property of the plaintiff in its contract (Exhibit VI) with the said Allegheny Steel Company and, tho often requested, have made no compensation to this plaintiff for so doing, as the defendants lawfully must under the provisions of Article Five of the Constitution of the United States providing: "nor shall private property be taken for public use, without just compensation."

The plaintiff further alleges for its cause of action: that the defendants, tho well knowing and admitting the right, title and property of the plaintiff in its contract aforesaid, herein set out as Exhibit VI, hereto attached and made a part hereof, with the Allegheny Steel Company, a corporation of Pittsburgh, Pennsylvania, throughout the year 1918, up to and including the eleventh day of November of that year and sometime thereafter, continued to refuse to permit the said Allegheny Steel Company to fulfill its contract aforesaid with the plaintiff; that the defendants continued, for the period last named, thus to take for public use the private right of the plaintiff to priority in the 1918 production of steel ship plate by the said Allegheny Steel Company; that the defendants continued, for the period last named, to employ for public use, in the manufacture by the said Allegheny Steel Company of the steel ship plate, the raw materials purchased by the said Allegheny Steel Company
9 by means of the letters of credit posted by the plaintiff in favor of the Allegheny Steel Company under the terms of the contract aforesaid (Exhibit VI); that the defendants, for the period last named, took for public use as it was produced, the very ship plate which belonged to the plaintiff under its contract last aforesaid (Exhibit VI); that the defendants took the aforesaid property of the plaintiff for the actual substantial benefit of the public; that, though often requested so to do, the defendants have totally refused to pay to the plaintiff just compensation for this taking of private property for public use as they lawfully must under the provisions of *the* Article V of the Constitution of the United States hereinbefore quoted.

The plaintiff further alleges: that submitting to the lawful demands of its sovereign government, it made every possible effort

known to it to avoid the calamitous result to it of the action of the defendants and that every step was taken and every channel conceivable explored in an effort to mitigate the injuries resulting from the orders and acts of the defendants set forth in the three paragraphs next preceding; that all such effort proved of no avail and that the total loss incurred by the plaintiff as a direct result of the acts of the defendants, described in the three paragraphs next preceding, was the sum of Nine Hundred and Ninety Thousand Dollars ($990,000), which is the consideration paid to the Allegheny Steel Company aforesaid by the transfer of machinery and equipment to that company, as hereinbefore described, for the contract right given the plaintiff under the terms of the contract set out in Exhibit VI, hereto attached and made a part hereof. This amount and no less, after allowing for just credits and offsets to the defendants, is due and unpaid.

The plaintiff further alleges that it presented its claim under the provisions of Section 1 of the Act of March 2, 1919, 40
10 Stat. 1273, to the Secretary of War in the manner prescribed by that officer in rules and regulations issued by him and that said officer has refused to afford the plaintiff any relief in the premises; that the plaintiff is the sole owner of the claim herein presented; that no assignment or transfer of said claim or any part thereof or interest therein has been made; that the claimant has always borne true allegiance to the government of the United States.

Wherefore the plaintiff prays judgment against the defendants in the sum of Nine Hundred and Ninety Thousand Dollars ($990,000).

JACOB MEURER,
Secretary Omnia Commercial Company, Incorporated, Plaintiff.

GEORGE M. MORRIS,
Attorney for the Plaintiff.

11 *Verification.*

STATE OF NEW YORK,
County of Kings, ss:

Jacob Meurer, being duly sworn deposes and says; that he is the subscriber above; that he is the secretary of the plaintiff corporation in the above entitled cause with full power to sign the foregoing petition on behalf of said corporation; that he has read carefully the foregoing petition, knows the contents thereof and that he sincerely believes every statement made therein to be wholly true.

JACOB MEURER.

Subscribed and sworn to before me this 1st day of April, 1921.
April, 1921.

N. H. GLODE,
Notary Public.

Bronx Co. No. 52, Reg. No. 11. New York Co. No. 113, Reg. No. 3125. Kings Co. No. 10, Reg. No. 3073. Queens Co. No. 189. Certificate filed in Richmond and Westchester Cos.

12 EXHIBIT I.

Allegheny Steel Company,
Olive Building,
Pittsburgh, Pa.

May 14, 1917.

Mr. Charles Dannen,
Hotel Biltmore,
New York, N. Y.

DEAR SIR:

We hereby confirm conversation between yourself, Mr. R. P. Tucker and writer, in which we quoted you, for 1,500 tons per month of Basic Open Hearth Sheared Steel Ship Plates to Lloyd's specifications, and for delivery in approximately equal monthly quantities during the year 1918, a price of $6.25 per 100# F. O. B. cars our Mill at Brackenridge, Pa.

In submitting the above proposition it is understood that you will specify sizes satisfactory to us and in any event not to exceed 90" wide, lengths within the range shown on the table attached hereto.

Price is based on furnishing rectangular plates only; sketch items must not, in any event, exceed 10% to be submitted to us for consideration.

All agreements contingent upon strikes, accidents, or other causes beyond our control. On unsatisfactory material our liability is limited to value of material or replacement of same. No allowances for labor. Quotations subject to approval by our credit department. Quotations subject to change without notice.

Assuming that this material is intended for export, it is understood that our terms require that when order is placed with us you will establish, in a New York or Pittsburgh Bank satisfactory to us, an irrevocable credit covering full value of the tonnage involved, payments to be made upon presentation of our invoices, to which will be attached sight draft and inland bill-of-lading; ½ of 1% discount to be allowed from face of invoice for said cash payment.

If material is not intended for export, terms satisfactory to our Credit Department to be arranged.

It is understood that the above quotation is made for acceptance not later than Tuesday, May 22nd.

Yours very truly,

ALLEGHENY STEEL COMPANY,

(Sig.) HARRY E. SHELDON,
President.

H. E. S.: J.

13 EXHIBIT II.

Postal Telegraph—Commercial Cables.

Telegram.

May 17, 1917.

Allegheny Steel Co.,
c/o Harry E. Sheldon, President,
Oliver Building,
Pittsburgh, Pa.:

We hereby accept your proposition as contained in your letter of May fourteen, Nineteen Hundred and Seventeen.

(Sig.) CHARLES DANNEN.
(" ") R P TUCKER

Prepaid.
Charge Room 1531.

EXHIBIT III.

May 17, 1917.

Allegheny Steel Co.,
c/o Harry E. Sheldon, President,
Oliver Building,
Pittsburgh, Pa.

DEAR SIRS:

We have just wired you as follows:

"We hereby accept your proposition as contained in your letter of May fourteen, Nineteen Hundred and Seventeen."

which wire we beg hereby to confirm.

Yours very truly,

(Sig.) CHARLES DANNEN,
" R. P. TUCKER.

14 EXHIBIT IV.

Contract made this fifteenth day of June, A. D., 1917, by and between Harry E. Sheldon and Robert D. Campbell, of the City of Pittsburgh, Allegheny County, Pennsylvania, hereinafter designated "Vendors", parties of the first part, and Charles B. Eddy, Jacob Meurer, Charles Dannen and R. P. Tucker, all at the date hereof residing in New York City, New York, hereinafter designated "Purchasers", parties of the second part.

Witnesseth:—that said Vendors and Purchasers covenant and agree to and with each other, each jointly and severally binding themselves, their respective heirs, executors and administrators, as follows, to-wit:—

First. That there has been executed on the date above written a contract wherein the Purchasers herein, except Jacob Meurer, are designated the Vendors, and the Vendors herein are therein desig-

nated the Purchasers, providing for the sale and delivery to the Vendors herein of certain personal property, to-wit, a 34-inch blooming mill and equipment, etc., etc.; a direct current 6,000 H. P. reversible motor and other electrical apparatus constituting an electrical plant for the operation of said blooming mill, etc., etc.; and some 1,363 tons of structural steel, together with the transfer of some eight contracts to which the Chattanooga Steel Company of Chattanooga, Tennessee, is a party, and that the vesting of the title to said property and contracts, together with the exclusive and undisputed possession thereof in the Vendors herein is necessary and essential to enable the vendors to manufacture and deliver the ship plates and tank plates hereinafter specified.

Second. That said contract mentioned in Section First hereof is expressly made part of this agreement, with the same effect as if set forth herein at length, and that unless the title and possession to the personal property therein mentioned is absolutely vested in the Vendors herein on or before July 15th, 1917, this contract shall at the option of the Vendors herein be null and void, and shall become null and void upon said Vendors mailing to R. P. Tucker, one of the Vendors notice declaring this contract to be null and void, addressed to him at Hotel Vanderbilt, New York City, New York, and after the mailing of said notice, nothing herein contained shall be binding and effective upon and against said Vendors.

Third. Subject to the conditions expressed in Sections First and Second hereof and upon the terms and conditions and for the considerations hereinafter set forth, the Vendors will deliver to the Purchasers or their order, during the year 1918, in approximately equal monthly installments, 25,000 tons of ship plates according to Lloyds specifications and subject to Lloyds' inspection but within the schedule of sizes and restrictions enumerated in Exhibit "A" attached hereto and made part hereof, at the price of seven and three-quarter cents (7¾c) per pound delivered f. o. b. cars Pittsburgh rate district, and also 15,000 tons of ordinary commercial tank plates within the same sizes specified in said Exhibit "A" for ship plates at six and three-quarter cents (6¾c) per pound delivered f. o. b. cars Pittsburgh rate district; the considerations for all of said plates, both ship and tank, to be protected and paid for in manner following, to-wit:

(*a*) On or before December 15th, 1917, the Purchasers will establish in a financial institution satisfactory to the Vendors herein an irrevocable credit of at least One Million ($1,000,000.00) Dollars which shall continue in force and effect until all of the plates, ship and tank, contemplated to be manufactured and delivered hereunder shall be manufactured and delivered said credit to be applicable to the payment of the last shipments of said plates upon the same terms and conditions as are herein set forth with relation to the monthly payments for monthly deliveries of said plates.

(*b*) On or before the fifth day of each month of the year 1918, the Vendors shall notify said financial institution of the probable

tonnages of both classes of plates to be delivered under the
16 provisions hereof during the then current month and thereupon on or before the twentieth of each month of said year the Purchasers shall establish at said financial institution sufficient irrevocable credits in addition to said One Million ($1,000,000.00) Dollar credit above mentioned to meet and pay for the tonnages delivered in each of said months in accordance with the notice above specified.

(c) All of said irrevocable credits shall be established at said financial institution from time to time as above provided with the irrevocable authority and power in said institution acting through its proper officer or officers to pay to the Vendors herein the prices herein provided to be paid for said plates upon presentation of invoices for said plate tonnages accompanied by bills of lading consigning said plates to the Purchasers at New York City, New York, or such other points as said Purchasers may direct and notify said institution and the Vendors herein in writing from time to time, railroad weights to control and fix the amounts of said payments.

Fourth. It is mutually understood and agreed that in the event that the Purchasers fail at any and all times to maintain and procure to be established the irrevocable credits and to cause the same to be disbursed in the manner specified in sub-paragraph (a), (b) and (c) of Section Third hereof, the Vendors shall have the following options: (a) to cancel this contract in its entirety, or any unperformed part thereof absolutely; (b) to postpone delivery of said plates until said credits are established, maintained and provided to their satisfaction; and (c) to deliver all plates manufactured up to the time of default by the Purchasers with relation to said irrevocable credits.

Said financial institution shall be bound to certify to the Vendors upon their requests the amounts of said irrevocable credits established and maintained with it by the Purchasers from time to time available for the purposes of this contract.

Before exercising said options (a), (b) and (c) mentioned in this
17 paragraph, the Vendors shall give the Purchasers ten (10) days' written notice of their intention so to do, which notice shall be deposited with the institution in which said irrevocable credits are established and maintained, which notice when so written shall be binding and effective upon the Purchasers herein; if the Purchasers within the term of said ten (10) days' notice shall restore said One Million ($1,000,000.00) Dollar credit and establish the additional irrevocable credit to provide for the monthly shipment notified as above provided, and said institution shall notify the Vendors thereof according to the fact by written notice addressed to the Vendors at 2332 Oliver Building, Pittsburgh, Pennsylvania, said vendors shall not at the time have the right to exercise said options, otherwise the right to exercise said options shall be absolute in said Vendors.

Fifth. It is further mutually understood and agreed that any written instrument necessary to be signed, sealed and delivered in

connection with the carrying out of the provisions hereof, signed, sealed and delivered by either of the Vendors shall be binding and effective upon both of said Vendors, and that any such instrument signed, sealed and delivered by said R. P. Tucker, one of the Purchasers, on behalf of himself and his associates, the Purchasers herein, shall be binding and effective upon all of said Purchasers.

Sixth. It is further mutually understood and agreed that these presents constitute the entire contract between the parties hereto with reference to the several subject matters hereof, and that this contract shall not be amended, modified or altered, except by written instrument executed by or on behalf of the parties hereto, and that no oral amendment, alteration or modification hereof shall be binding and effective upon any of the parties hereto unless reduced to writing and expressly made part hereof.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

HARRY E. SHELDON, [SEAL.]
ROBERT D. CAMPBELL, [SEAL.]
Vendors.
R. P. TUCKER, [SEAL.]
CHARLES B. EDDY, [SEAL.]
CHARLES DANNEN, [SEAL.]
JACOB MEURER, [SEAL.]

18 EXHIBIT "A."

Attached to and forming part of the contract dated June 15th, 1917, between Harry E. Sheldon and Robert D. Campbell, of Pittsburgh, Pennsylvania, and Charles D. Eddy, Jacob Meurer, Charles Dannen and R. P. Tucker.

Specifications Sizes, Shapes and Quantities.

It is agreed that the second parties will specify satisfactory quantities of sizes satisfactory to the first parties and in any event not to exceed 108 inches wide and all lengths within the range shown on the following table:

Thickness in inches.	Weight per sq. ft.	Widths "—inches								
		30 to 40	41 to 48	49 to 54	55 to 60	61 to 72	73 to 84	85 to 96	97 to 100	101 to 108
1/4	10.2	360	240	0	360	432	360	240	0	0
5/16 ...	12.75	360	360	0	360	432	432	360	0	0
3/8	15.30	360	400	360	432	180	180	400	400	360
1/2	20.40	360	400	400	432	180	180	180	180	400
3/4	30.60	0	0	0	300	360	360	336	300	300
1"	40.80	0	0	0	300	300	275	250	250	0
1 1/4	51.00	0	0	0	260	260	220	180	180	0

Specifications shall cover rectangular plates principally, but sketch items satisfactory to the first parties only will be accepted, but will not be accepted in any event in excess of 10% of any monthly quota.

Restrictions and Conditions.

The first parties shall not be liable for any delays, losses or damages caused by fire, differences between employes and employers, executing the contract of which this is an exhibit, accidents, government seizures or stoppages or contingencies beyond the control of the first parties. Any of such causes shall be sufficient reason for any delays in the performance of the provisions of said contract caused thereby.

Approved ——— —, 1917.
(Sig.)

HARRY E. SHELDON,
For Himself and Associates.
R. P. TUCKER.
For Himself and Associates.

19 EXHIBIT V.

Contract Made this Fifteenth day of June, A. D., 1917, by and between Charles B. Eddy, R. R. Watney, Charles Dannen and R. P. Tucker, all at the date hereof residing in New York City, New York, hereinafter designated "Vendors," parties of the first part, and Harry E. Sheldon and Robert D. Campbell, of the City of Pittsburgh Allegheny County, Pennsylvania, hereinafter designated "Purchasers," parties of the second part.

Witnesseth:—that said Vendors and Purchasers covenant and agree to and with each other, each jointly and severally binding their respective heirs, executors and administrators, as follows, to wit:—

First. The Vendors will sell, assign, transfer and deliver at the points hereinafter specified to said Purchasers or their written order upon the terms and conditions herein contained, the following property, to-wit:

(*a*) One 34-inch blooming mill with all the equipment in connection therewith or pertaining thereto, more particularly enumerated and described in a contract between the National Roll & Foundry Company of Avonmore, Pennsylvania, and Chattanooga Steel Company of Chattanooga, Tennessee, dated March 7th, 1916, to be delivered at the works of said National Roll & Foundry Company at Avonmore, Pa., in accordance with the terms of said contract, free and clear of all claims and encumbrances of whatsoever nature by the manufacturer thereof or any other person, firm or corporation whatsoever, consigned to said Purchasers at such point as they may in writing designate, the Purchasers to pay the freight between Avonmore and said designated point of destination.

(*b*) One direct current 6,000 H. P. reversible motor and other equipment and appurtenances constituting the electrical plant described and specified in the contract and specifications thereto
20 between the Westinghouse Electric & Manufacturing Company of East Pittsburgh, Pa., and Chattanooga Steel Company of Chattanooga, Tennessee, dated August 30th, 1916, to be delivered on board cars at Chattanooga, Tennessee, free and clear of all claims and encumbrances of whatsoever nature by the manufacturer thereof or any other person, firm or corporation whatsoever, consigned to said Purchasers at such point as they may in writing designate, the Purchasers to pay the freight between Chattanooga and said designated point of destination, and all reasonable loading charges thereon.

(*c*) Approximately 1363 tons of structural steel generally in accordance with schedule hereto attached and marked Exhibit "A" and made part hereof, to be delivered on board cars at Chattanooga, Tennessee, free and clear of all claims and encumbrances of whatsoever nature by any person, firm or corporation whatsoever, consigned to said Purchasers as they may in writing designate, the Purchasers to pay the freight between Chattanooga and said designated point of destination, and all reasonable loading charges thereon.

(*d*) Written transfers in form satisfactory to counsel for Purchasers of all the right, title, interest, claim and demand of, in and to the contracts specified in this paragraph (*d*) of all parties other than the original sellers in said contract, which said contracts are as follows, and which are hereby expressly made a part hereof with the same force and effect as if herein at length set forth, said Vendors herein to deliver true and correct copies thereof to said Purchasers to-wit:—

1. Four certain contracts between the Chattanooga Steel Company of Chattanooga, Tennessee, and Walsh & Weidner Boiler Company of Chattanooga, Tennessee.

2. Any contracts which may now exist between the Harbison-Walker Refractories Company of Pittsburgh, Pa., and Chattanooga Steel Company of Chattanooga, Tennessee.

3. Two certain contracts now existing between the General Electric Company of Schenectady, New York, and the Chat-
21 tanooga Steel Company of Chattanooga, Tennessee.

Second. Upon the delivery by the Vendors to the Purchasers or their duly authorized representatives that property specified in sub-paragraphs (*a*), (*b*) and (*c*) and the transfers of contracts specified in sub-paragraph (*d*) of Section First hereof, accompanied by the written consent of the Chattanooga Steel Company, acting through C. E. James, of Chattanooga, Tennessee, or other duly authorized officer of said company, and the individual written assent of said C. E. James to the delivery of said property and contracts transferred as aforesaid, together with a certified copy of the authority from said Steel Company to said James to consent thereto on its behalf, the Purchasers will pay to the Vendors the sum of **Five**

Hundred Thousand ($500,000.00) Dollars, in manner following, to-wit:

(*a*) On or before June 18th, 1917, the sum of One Hundred and Fifty thousand ($150,000.00) Dollars.

(*b*) On August 1st, 1917, the sum of One Hundred Thousand ($100,000.00) Dollars, with interest from June 20th, 1917, at the rate of 6% per annum.

(*c*) On September 1st, 1917, the sum of One Hundred Thousand ($100,000.00) Dollars, with interest from June 20th, 1917, at the rate of 6% per annum.

(*d*) On November 1st, 1917, the sum of One Hundred and Fifty Thousand ($150,000.00) Dollars, with interest from June 20th, 1917, at the rate of 6% per annum.

Third. It is mutually understood and agreed that the undertaking of the Vendors to sell and deliver the property specified in sub-paragraphs (*a*), (*b*) and (*c*) of Section First hereof is the essential and moving consideration to the Purchasers to make this contract, and a failure on the part of the Vendors to make delivery of the property specified in any one of said sub-paragraphs shall give the Purchasers the option to the right as they in their absolute judgment and discretion may determine, to accept delivery and pay for such of said property as shall have been delivered at any
22 time within thirty days after date hereof at a price which will not be greater than that part of Five Hundred Thousand ($500,000.00) Dollars which the contract price of the property delivered bears proportion to the aggregate of the contract prices of said property described in said sub-paragraphs (*a*), (*b*) and (*c*), and to refuse to accept further deliveries of said property.

Fourth. It is further understood and agreed that any written instrument necessary to be made and delivered in connection with the carrying out of the provisions hereof, signed and sealed by said R. P. Tucker on behalf of himself and his associates, the Vendors herein, shall be binding and effective upon all of said Vendors, either of said Purchasers may sign and seal such written instruments and bind both of said Purchasers with like effect as in the case of said Vendors.

Fifth. It is further mutually understood and agreed that these presents constitute the entire contract between the parties hereto with reference to the several subject matters hereof, and that this contract shall not be amended, modified or altered, except by written instrument executed by or on behalf of the parties hereto; and that no oral amendment, alteration or modification hereof shall be binding and effective upon any of the parties hereto unless reduced to writing and expressly made part hereof.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

R. P. TUCKER. [SEAL.]
CHARLES B. EDDY. [SEAL.]
CHARLES DANNEN. [SEAL.]
(RALPH R. WATNEY,) [SEAL.]
R. R. WATNEY.
Vendors.
HARRY E. SHELDON. [SEAL.]
ROBERT D. CAMPBELL. [SEAL.]
Purchasers.

This contract was carried out by the parties hereto.
Signed) R. P. TUCKER.

23 EXHIBIT A 1.

Duplicate of Original.

Agreement of sale, made this 23rd day of August, 1917, by and between Allegheny Steel Company of the City of Pittsburgh, State of Pennsylvania, hereinafter called the Seller, and Omnia Commercial Company, Inc., of 55 Liberty St., City and State of New York, hereinafter called the Buyer, witnesseth:

1. That the Seller hereby sells and the Buyer hereby buys material hereinafter described, subject to the conditions hereinafter expressed.

Quantity.

2. The quantity covered by this contract is eighteen thousand (18,000) net tons of two thousand (2,000) pounds each, basic open hearth steel ship plate, subject to Lloyd's specifications and to Lloyd's inspection at Buyer's expense, (See Lloyds Registered Rules for the Inspection of Steel Vessels 1915 16 edition.) It is agreed that Lloyd's inspection and acceptance constitute a final acceptance for the buyer's account; and the certificate of acceptance of Lloyd's inspectors shall constitute the sole and unimpeachable evidence that said plates meet the requirements of this contract.

Price.

3. The price shall be Six Dollars and Fifty Cents ($6.50) per one hundred pounds base for one quarter inch (¼") and heavier rectangles, and subject to the Seller's regular plate mill sales extras.

Deliveries.

4. Steel plates to be shipped in car load lots f. o. b. Seller's mill, to which it is understood the Pittsburgh rates of freight apply for points outside of Pittsburgh District to be consigned to the Buyer or as it

may direct; to be delivered during the year 1918 in approximately equal monthly quantities.

Specifications.

24 5. Specifications to be given for delivery during the year 1918, to be of gauges and sizes within the Seller's capacity with the customary allowance for variation in weights, sizes and lengths. Specifications in detail shall be given by the Buyer to the Seller before October 15, 1917, covering approximately Fifty Per cent (50%) of the plate to be shipped hereunder, and specifications in detail shall be given by the Buyer to the Seller before April 1st, 1918, covering approximately an additional Twenty-Five Per cent (25%) of the plate to be shipped hereunder, and specifications in detail shall be given by the Buyer to the Seller before July 1st, 1918, covering the remaining Twenty-Five per cent (25%) same being the entire balance of the plate to be shipped hereunder, each month's quota to constitute a separate and independent obligation on the part of the Buyer, except as otherwise agreed herein. Such portion of any monthly tonnage which may be specified and not produced at the end of each month it is understood that the Seller will produce as soon after that date as its mill conditions will permit. It is agreed that the Buyer will specify quantities and sizes satisfactory to the Seller and, in any event, not to exceed 90" wide and of lengths within the range shown on the table attached hereto and made a part hereof. It is understood that this contract is for rectangular plates principally, and that other shapes of plate must not in any event exceed ten per cent (10%) of any monthly quota, same to be submitted for the Seller's consideration.

Conditions.

6. The Seller shall not be liable for any loss or damage caused by fire, differences with employees, accidents, government seizures, embargoes (railroad or otherwise) or stoppages or contingencies beyond its control and any of such causes shall be sufficient reason or excuse for any delay caused thereby. In the event of any change in specifications of orders, entered, the full contract price will be paid on any tonnage then in course of manufacture. This is an 25 irrevocable sale and is not subject to cancellation, suspension of shipment or any change in prices, except as provided herein.

Special Agreement.

7. The Buyer's failure to furnish specifications as to any particular month's tonnage as herein provided, at the Seller's option shall be deemed a refusal to accept such tonnage, and in that event promptly thereafter the Seller may give written notice by mail to the Buyer of its intention to resell, and after the lapse of ten days from the mailing of said written notice the Seller shall have the right to sell the said tonnage on the open market at a time convenient to

the Seller for the Buyer's account, and to collect from the Buyer, the difference between the price at which the said tonnage is so sold and the price at which the Buyer has agreed to purchase provided it is sold for less than the price specified in this contract; that is to say, if the tonnage is sold at a rate of five cents per lb., the seller would collect from the Buyer the difference between five cents per lb. and six and one-half cents per lb., the price at which the Seller is selling to the Buyer. After such sale has been made for the Buyer's account, as above specified, the Seller shall notify the Buyer in writing of the price obtained by it and such notice shall fix the price without recourse or any right to object thereto on the part of the Buyer. Any such tonnage so sold shall be deducted from the undelivered tonnage of the contract.

Terms of Payment

8. Payment shall be net cash on presentation to bank specified herein of railroad bills of lading with invoices attached. The buyer shall establish in favor of the Seller on or before Sept. 1st, in a financial institution of New York City satisfactory to the Seller, irrevocable credits for at least $1,000,000, and thereafter shall maintain credits to the amount of not less than $1,000,000 until February 15, 1919, except that when the payments for the tonnage yet to be delivered hereunder are equivalent to $1,000,000, the payments thereafter shall be made from the $1,000,000 of credits then in effect.

On or before the 5th day of the month preceding each
26 monthly shipment, the Seller shall notify the said Buyer of the probable value of plates to be delivered under this contract during the succeeding month and thereupon on or before the 20th day of the month in which said notice is given the Buyer shall establish at said Financial Institution sufficient irrevocable credit in addition to said $1,000,000 credit above mentioned to meet and pay for the tonnage to be delivered during such month in accordance with the notice given as specified above.

All of said irrevocable credits shall be established at said Financial Institution from time to time as above provided, with the irrevocable direction, authority and power to said Financial Institution to pay to the Seller herein the payments provided for in this contract to be made upon presentation of invoices and bills of lading, as provided herein.

9. It is mutually understood and agreed that in event the Buyer fails at any and all times to maintain and establish the irrevocable credits and to cause the same to be disbursed and paid to the Seller in the manner specified, the Seller will have the right to cancel any unperformed part of this contract, but before exercising this right the Seller shall give the Buyer twenty (20) days' written notice of its intention so to do, a copy of which notice shall be mailed to said Financial Institution, in which said irrevocable credits are established. If the Buyer within the term of said twenty (20) days shall establish all credits agreed to be established, and pay all amounts due

hereunder up to that particular date and said Financial Institution shall so notify the Seller, addressing such notice to the Seller at Oliver Building, Pittsburgh, Pa., the Seller shall not for that particular offense have the right to exercise said option to cancel this said contract, otherwise the right to exercise the said option shall be absolute in the said Seller.

10. It is expressly agreed and understood between the parties hereto that the foregoing agreement comprises the entire agreement between the parties, and that there are no covenants, conditions or understandings independent of or collateral hereto, except the letter of credit hereinabove provided for.

27 In witness whereof, the parties hereto have caused these presents to be signed by their proper officers and their seals affixed.

This 17th day of Sept., A. D. 1917.

ALLEGHENY STEEL COMPANY.

(Sig.) By HARRY E. SHELDON,
President.

Attest:

(Sig.) R. D. CAMPBELL,
Treasurer.

OMNIA COMMERCIAL COMPANY, INC.,

(Sig.) By R. P. TUCKER,
President.

Attest:

(Signed) JACOB MEURER,
Secretary.

28 EXHIBIT VII.

New York, N. Y., May 19, 1917.

Quantity.

Omnia Commercial Co., Inc., of 55 Liberty Street, New York City, State of New York, sells and Vulcan Steel Products Co. of 120 Broadway, New York City, State of New York, buys the material herein described, subject to the conditions herein expressed. Specifications to be given for delivery during 1918 to be of gauges and sizes within the Seller's capacity, with the customary allowance for variation in weights, sizes and lengths.

Description and Price.

18,000 tons Basic Open Hearth Steel Ship Plates to Lloyd's specifications and subject to Lloyd's inspection for Purchaser's account. $9.25 base per cwt. Usual extras.

Specification.

Specifications in detail shall be given by Buyer in approximately equal monthly quantities, at least ninety days prior to period in which required; each month's quota to constitute a separate and independent contract, except as agreed upon or noted below. On such portion of any monthly tonnage which may be specified and not shipped at the end of each month it is understood that Seller will make shipment as soon after that date as Producer's mill conditions will permit. Purchaser will specify sizes satisfactory to Seller, and in any event not to exceed ninety inches wide, and of lengths within the range shown on the table attached hereto and made a part hereof. Rectangular plates only and sketch items must not, in any event, exceed ten per cent to be submitted for the Producer's consideration

Deliveries.

Goods to be shipped in carload lots F. O. B. mill, freight equalized with Pittsburgh, consigned to Vulcan Steel Prod-
29 ucts Co. or as they may direct; to be delivered during 1918, in approximately equal monthly quantities.

29

Conditions.

The Seller shall not be liable for any loss or damage caused by fire, differences with employees, accidents, government seizures or stoppages (affecting either Seller or Producer) or contingencies beyond its control and any of such causes shall be sufficient reason for any delay caused thereby. No claims for errors or deficiencies will be allowed by Seller unless made by Buyer within thirty days after receipt of material. The Seller agrees to replace material found defective, when in hands of the Buyer, but will not allow or pay any claim for labor, damage or expenses resulting. In event of cancellation of orders entered, the full contract price will be paid on any portion then in course of manufacture. This in an irrevocable sale and is not subject to cancellation (except as provided below), suspension of shipment or to any change in prices.

Terms of Payment.

Net cash, on presentation of Railroad Bills of Lading with invoices attached.' On or before June 25, July 25, and August 25, 1917, respectively, the Buyer shall establish with Empire Trust Co. or some other banking institution satisfactory to the Seller, three irrevocable letters of credit, one of such letters to be established on or prior to each of said dates, each of said letters to be good for the entire term, and each to be good for one-third of the whole purchase price of this contract, whereunder such institution shall be authorized and directed to pay the Seller for all materials sold hereunder on presentation of Bills of Lading as aforesaid. The Purchaser is aware

of the fact that the Seller has in turn engaged with the Producer to supply irrevocable credits for the materials comprised hereunder, and that the Seller will depend upon the credits so to be arranged by the Purchaser as a basis of supplying its own credits to the Producer.

If Buyer fails to make any payment according to the terms of this contract, Seller shall be under no obligation to make further shipments and for said cause may at its election at any time cancel all or any part of Buyer's unfilled or uncompleted contracts with Seller.

Accepted:

OMNIA COMMERCIAL COMPANY, INC.,

(Signed) By CHAS. B. EDDY,
President

Attest:

(Signed) JACOB MEURER,
Secretary.

Accepted:

VULCAN STEEL PRODUCTS CO.,

(Signed) By O. KAFKA,
General Manager.

Attest:

(Signed) H. D. MILLS,
Treas.

Sizes—Sheared Plates.

May 1, 1917.

Thickness in inches.	Weight per sq. ft.	Widths—inches. 30 to 50	51 to 60	61 to 72	73 to 90
1/4	10.20	360	360	432	360
5/16	12.50	360	360	432	360
3/8	15.30	432	432	432	180
1/2	20.40	132	432	432	180
3/4	30.60	0	300	360	360
1	40.80	0	300	360	2,888
1 1/4	51.00	0	0	264	216

31 II. *Demurrer.*

Filed August 12, 1921.

Now comes the defendant by its Attorney General, and demurs to the petition in the above entitled cause, for the reason that it does not state a cause of action against the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

JOHN C. EWING,
Attorney.

III. *Argument and Submission of Demurrer.*

On October 24, 1921, the demurrer in this case was argued by Mr. John G. Ewing, for the defendant, and by Mr. George M. Morris, for the plaintiff.

32 IV. *Opinion of the Court by Hay, J., on Defendant's Demurrer.*

Entered Oct. 31, 1921.

HAY, *Judge,* delivered the opinion of the court:

This is a petition brought by the Omnia Commercial Company against the United States to recover the sum of $990,000. To this petition of the plaintiff the defendant has demurred.

The petition alleges that the plaintiff entered into an agreement in writing dated June 15, 1917, with the Allegheny Steel Company, by the terms of which the Allegheny Steel Company was to deliver to the plaintiff a certain number of tons of ship plates and tank plates during the year 1918, for which the plaintiff was to pay in property and money. The petition further alleges that the plaintiff, relying upon its contract with the Allegheny Steel Company, agreed to sell certain amounts of said plates to the Vulcan Steel Products Company so as to produce a profit to the plaintiff. The petition further alleges that the United States Government in the month of October, 1917, and before any deliveries had been made to the plaintiff by the Allegheny Steel Company, notified the Allegheny Steel Company that it required for public use the steel plate production capacity of the said Allegheny Steel Company for the year 1918, and demanded that the Allegheny Steel Company refuse to comply with its contract with the plaintiff; and that by reason of this action of the United States the Allegheny Steel Company was prevented from complying with its contract with the plaintiff, and did not comply with the same; and that the United States by such action took for public use the property of the plaintiff in its contract with the Allegheny Steel Company, and has made no compensation to the plaintiff, as the defendant must do under the provision of article 5 of the Constitution of the United States. The petition further alleges that the total loss to the plaintiff was the sum of $990,000, which is the consideration paid to the Allegheny Steel Company by the transfer of machinery and equipment to that company.

The plaintiff is proceeding against the United States to recover the value of property which it claims was taken by the United States from it for public use without just compensation. And it bases its claim upon the provision of Article Five of the Constitution. If the United States did take the property of the plaintiff for public
33 use the plaintiff is entitled to just compensation therefor. The question at once arises, What property of the plaintiff did the United States take? According to the allegations of the petition the United States took the property of the Allegheny Steel Corporation; they took from the plaintiff no tangible property. There was no

privity between the plaintiff and the United States. The plaintiff had a contract with the Allegheny Steel Company for the future delivery of its product to the plaintiff. The fact that the United States in the progress of its prosecution of the war in which it was then engaged took the products of the Allegheny Company, and thereby prevented its fulfilling its contract with the plaintiff, does not give the plaintiff any claim against the Government.

When the plaintiff entered into the contract with the Allegheny Steel Company it knew, or ought to have known, that the products of that company were liable to be taken by the United States. But be that as it may, there is no warrant for the assertion of a claim by the plaintiff against the United States in the allegations of its petition. The property claimed to be taken is a contract for the future delivery of materials to which the United States is not a party. Such a claim is intangible, illusive, without substance, and is not such property as is contemplated in Article Five of the Constitution.

The petition alleges that the plaintiff presented its claim to the Secretary of War under the provisions of section 1 of the act of March 2, 1919 (40 Stat. 1273), and that such claim was rejected by said official. There is no contract express, implied, or informal between the plaintiff and the United States; and that being so, the plaintiff is not entitled to recover under the provisions of the act aforesaid.

The demurrer of the defendant is sustained, and the petition of the plaintiff is dismissed.

Graham, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

34 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Thirty-first day of October, A. D., 1921, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By THE COURT.

VI. *Plaintiff's Application for and the Allowance of an Appeal.*

Omnia Commercial Company, Incorporated, plaintiff, by George Maurice Morris, its attorney, makes application to the honorable Court of Claims for an appeal from this court's decision in the above entitled case to the Supreme Court of the United States.

GEORGE MAURICE MORRIS,
Attorney for the Plaintiff.

Filed Nov. 26, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

Dec. 6, 1921.

35

Court of Claims.

No. 197-A.

OMNIA COMMERCIAL COMPANY, INC.,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the argument and submission on demurrer; of the opinion of the Court on demurrer by Hay, J.; of the judgment of the Court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventh day of December, A. D. 1921.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,608. Court of Claims. Term No. 653. Omnia Commercial Company, Inc., appellant, vs. The United States. Filed December 19th, 1921. File No. 28,608.

Office Supreme
FILE
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WM. R. STA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

OMNIA COMMERCIAL COMPANY, INC., *Appellant,*
vs.
THE UNITED STATES

No. 229.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

GEORGE MAURICE MORRIS,
Attorney for the Appellant.
FREDERICK N. WATRISS,
MELVIN G. PALLISER,
WILLIAM S. THOMPSON,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

OMNIA COMMERCIAL COMPANY, INC.,
Appellant,
vs.
THE UNITED STATES

No. 229.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

STATEMENT OF THE CASE

State of the Record: The claim forming the basis of this appeal was first presented to the Secretary of War on June 27, 1919, under the Act entitled, "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," approved March 2, 1919, 40 Stat. 1273. The claim was denied by that official October 12, 1920. A petition embodying the claim was filed in the Court of Claims June 15, 1921. On August 12, 1921, the United States filed a demurrer alleging that the petition did not state a cause of action against the United States. On October 31, 1921, the Court of Claims entered judg-

ment sustaining this demurrer. On November 2o, 1921, the plaintiff applied for an appeal. On December 6, 1921, the appeal was allowed. On December 19, 1921, the transcript in the case was filed in this court.

The Facts: In the year 1916, five associated individuals owned machinery, mill equipment, structural steel, real property, water and rail rights, all in condition for the erection and operation of a steel plate mill. After months of negotiations, the associates sold, in May, 1917, all their rights in these assets to the Allegheny Steel Company of Pittsburgh, Pennsylvania. The agreed value of these properties was $3,705,000. The consideration moving from the Allegheny Steel Company was to be paid as follows: $700,000 in cash and the remainder in 58,000 tons of steel plate to be delivered to the associates' order in equal monthly installments during 1918 upon the payment by the associates of a price $3,205,000 below the minimum market value of such plates.

The associates then formed two corporations in which they were the sole stockholders, officers and directors. These corporations succeeded to the rights of the associates in their contract with the Allegheny Steel Company for the 58,000 tons of steel plate, the expected entire production of the Allegheny Steel Company for 1918. To the appellant corporation was conveyed the right to receive 18,000 tons of the total 58,000 tons.

The contract between the appellant and the Allegheny Steel Company required the posting of letters of credit in favor of the Allegheny Steel Company. The appellant posted $2,370,000 in such letters in due season and form. These letters of credit enabled the Allegheny Steel Company to procure and did procure the raw materials necessary to performance of contract with the appellant. The appellant then – of the entire 18,000 tons of plate due under its

contract to responsible parties who established satisfactory credits.

Subsequently, in October, 1917, the United States, acting thru the Director of Steel Supply of the War Industries Board, notified the Allegheny Steel Company that the United States would require the company's entire capacity for production in 1918 and that if the Allegheny Steel Company made any attempt to fill the appellant's contract its entire plant would be confiscated by the United States, and operated for the public use.

The officers of the appellant submitted to what they recognized as a lawful action, but made every effort to secure even a partial performance of the appellant's contract. However, the agents of the United States refused to permit any deliveries to be made to the appellant but continued to take for public use the rights of the appellant to priority in the production of the Allegheny Steel Company, refusing any compensation to the appellant. This situation continued to and including November 11, 1918, and sometime thereafter.

By reason of the described taking by the United States, the loss of the appellant was $900,000. This was the value of the consideration paid by the assignors of the appellant to the Allegheny Steel Company for the appellant's contract with that company.

The appellant alleges that the government by seizing its rights under its contract, appropriating them for public use and destroying the value of its contract, took its property.

ASSIGNMENT OF ERRORS

The Court erred in holding:

First, that the contract between the plaintiff and the Allegheny Steel Company did not constitute property in

the plaintiff within the meaning of the Fifth Amendment to the Constitution.

Second, that when the United States took certain products of the Allegheny Steel Company and prevented that company's fulfilling its contract with the plaintiff that the United States gave the plaintiff no claim against the United States for compensation.

Third, that there was no implied contract between the plaintiff and the United States.

Fourth, that the demurrer should be sustained.

THE ARGUMENT

The finding of the Court of Claims that the plaintiff's (hereinafter called appellant) rights under its contract with the Allegheny Steel Company did not constitute property within the meaning of the Fifth Amendment to the Constitution is not supported by any authority nor by logical reasoning.

Were it not for the statements of the court below and the serious consequences attendant thereupon, the appellant would not take the time of this court to establish the elemental principle of law that rights under a lawful and binding contract constitute property in the holder and that such rights are property within the Fifth Amendment.

The Court of Claims itself in Peabody v. United States, 43 Ct. C. 5 *60* 10, has said: "Property has been well defined to be a person's right to possess, use, enjoy and dispose of a thing not inconsistent with the law of the land;" (citing 1 Lewis Eminent Domain, Sec. 54-58). No doubt this conception of Mr. Lewis finds an early source in 1 Blackstone's Commentaries, 138, where it is said that, "The right to property consists in the free use, enjoyment and disposal of all a person's acquisitions, without any control or diminution, save only by the laws of the land." Blackstone's defi-

nition of property has been cited with approval by innumerable courts and text writers. There can be no doubt that it states the essential features of the concept of property in the law generally.

It remains only to be seen whether when the Fifth Amendment has been discussed there has been any qualification of the meaning of the word "property" which would rob it of application to intangible as well as tangible rights. The state courts have repeatedly met with the necessity of defining the word property both as used in the state constitutions and in the Fourteenth Amendment. We quote from one which is typical of a host. Says the Court in Board of Education v. Bledgett, 155 Ill. 441, "The phrase 'life, liberty or property', in the first section of the 14th Amendment to the Constitution protects every valuable right which a man has, and the term 'property' therein embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty." Could the meaning of the word property be less restricted? See also New Hampshire's famous case of Eaton v. B. & M. Ry. Co., 51 N. H., 504; Gulf Railway Co. v. Fuller, 63 Texas, 467; Shaw, C. J., in Old Colony & Fall River R. R. v. County of Plymouth, 14 Gray (80 Mass.) 155 at 161.

Turning again to a text writer, we find in 1 Nichols (second edition) Eminent Domain at p. 336, "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of right or interest, capable of being enjoyed as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and intangible, incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds: "Intangible property such as choses in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this sovereign authority [the power of eminent domain] as fully as land or other tangible property." This statement is followed by seven or more citations to the decisions of this court.

Should support be needed for Nichols' statement, we refer to the opinion of Mr. Justice Lurton in Cincinnati v. Louisville & Nashville Ry. Co., 223 U. S. 390 *at* 400; 56 Law Ed. 481 *at* 483 from which the last passage in Nichols is almost a quotation. This court is too familiar with its own opinions in West River Bridge Co. v. Dix 6 Howard 507, 12 Law Ed. 535; James v. Campbell et al, 104 U. S. 356 at 539; 26 Law Ed. 786, at 787; New Orleans Gaslight Co. v. Louisiana Light and H. P. & Mfg. Co., 115 U. S. 650, 29 Law Ed. 516; cited so many times in its decisions, to require more detailed reference to these opinions.

We do wish to quote, however, from Mr. Justice Brewer in Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685 at 691, 41 Law Ed. 1165 at 1167. There the question was whether an appropriation by the city of the water company's plant called for compensation to be made the company for the destruction of its contracted opportunities to supply water to a customer. "A contract," says the Justice, "is property, and like any other property, may be taken under condemnation proceedings for public use."

Whether what is defined by the findings of the Court of Claims as "a contract for the future delivery of materials to which the United States is not a party," constitutes property, we contend:

When this court, itself, the courts of last resort in many of the states and recognized text authorities, have repeatedly held and said that property may consist of rights in intan-

gible things as well as rights pertaining to tangible things and that the word "property" as used in both the Fifth and the Fourteenth Amendments includes intangible rights, we submit that rights created by a lawful and binding contract are property. As a consequence, when the appellant set out in its original petition the contract between itself and the Allegheny Steel Company (Transcript of Record p. 15) and that contract on its face was lawful and binding, the appellant certainly claimed, the opinion of the honorable Court of Claims notwithstanding, "property as is contemplated in Article Five [the Fifth Amendment] of the Constitution." (Transcript of Record last line of paragraph beginning on page 22.)

In conclusion on this question, we call the attention of the court to the allegations in the appellant's petition (first paragraph beginning on page 2 of Transcript of Record) which state that for the property rights which the appellant secured, under its contract with the Allegheny Steel Company, the appellant's stockholders transferred to the Allegheny Steel Company a potential steel plant, equipment and accompanying rights valued at upwards of $3,700,000 and that in return the appellant was entitled jointly to receive substantially the entire product of the Allegheny Steel Company for the year 1918 at a price of $3,200,000 below the market value. It must be apparent from this that when the petition alleges the appellant was possessed of property in its contract with the Allegheny Steel Company that it is not alleging bare legal rights without value, but rights bought and paid for with a material consideration of a substantial amount. Indisputably, such rights were property and very valuable property within the meaning of the Fifth Amendment.

Second Assignment of Error

We come now to the second assignment of error, i. e., the holding of the court below that when the United States took certain products of the Allegheny Steel Company and prevented that company's fulfilling its contract with the plaintiff that the United States gave the appellant no claim against the United States for compensation. (Transcript of Record, second sentence beginning on p. 22.)

The appellant was possessed of certain rights in its contract with the Allegheny Company. That contract is set out as Exhibit VI of the appellant's original petition (Transcript of Record p. 15). By reason of this contract the appellant acquired in addition to those rights, common to all purchasers under a contract: the right to receive the finished product; the right to specify, within the capacity of the seller's mills, the gauge and size of the steel plate rolled; the right to inspect under Lloyd's Registered Rules for the Inspection of Steel Vessels, the product as it should be manufactured; the right to pay for the plate delivered at the times and in the manner provided; the right to specify the place of delivery; and finally and most important, the right to have the plates delivered during the year 1918 in approximately equal monthly quantities. It has been explained, in the Statement of Facts (See also Transcript of Record, second paragraph beginning on page 24, that to the appellant was assigned 18.58 of the expected entire production of the Allegheny Steel Company for the year 1918. That the right to get the delivery in equal monthly quantities during the year 1918 was a very valuable one is indicated by the sale of the expected steel plate by the appellant as set out in Exhibit VII of the original petition (Transcript of Record p. 18.)

Against these rights of the appellant what were the acts

of the officers of the United States? Cognizant of these rights, they forbade the Allegheny Steel Company to fulfill its obligations to the appellant under the latter's rights; they commanded the Allegheny Steel Company to fill only such orders as might be given to it by them. They commanded the Allegheny Steel Company to hold its entire manufacturing capacity at the complete and absolute disposal of the defendants; they continued to refuse to permit the Allegheny Steel Company to satisfy the rights of the appellant. (Transcript of Record pp. 4-5.)

What were the practical consequences of the course of the officers of the United States? It should be apparent that by reason of its contracts with the assignors of the appellants the Allegheny Steel Company was richer in equipment capacity and credit to the extent of $3,200,000. (Transcript of Record pp. 2, 7-15.) By reason of the preliminary performance by the appellant of its contract with the Allegheny Steel Company (Transcript of Record next to last paragraph p. 3) the Allegheny Steel Company had purchased sufficient raw materials to manufacture the steel plate for the appellant. The court is as capable as the appellant of visioning the material benefit these performances by the appellant and its assignors brought to the United States when the officers requisitioned the producing capacity of the Allegheny Steel Company's plant.

These benefits which the appellant had purchased and the returns from which it was due to receive from the Allegheny Steel Company were as verily taken by the United States as though the officers of the United States had caused to be substituted in the appellant's contract with the Allegheny Steel Company the name of the United States wherever there appeared the name of the appellant.

Not only, however, did the officers of the United States take the benefits for which the appellant had paid, but they

destroyed whatever benefit there was in the rights which the appellant had in its contract, saving only the right to be fairly compensated for its loss. From the appellant was taken the use, possession and disposal of the steel plates it had a right to receive from the Allegheny Steel Company and which it had already sold. With that went the entire material benefit of all the appellant's rights under its contract with the Allegheny Steel Company. What had been valuable, worth nearly a million dollars, was gone: taken for the public use: lawfully taken, yes, but lawfully compensated for, no.

For generations in this court and in many others, controversies have been waged as to what constitutes a "taking" of private property by the sovereign power. That this appellant had property within the meaning of the Fifth Amendment we think we have established in our argument on the first assignment of error. Let us turn now to what has been decided on what constitutes a taking within the meaning of that amendment.

In practically every case where the taking of intangible rights has been alleged, the plea has been made by the sovereign power that it actually took nothing from the owner; often that it received no benefit from the owner's loss. A good deal of loose thinking has been cloaked under the charge that the injuries were "consequential." These arguments, or their equivalent, were raised in the two leading cases of Pumpelly v. Green Bay and Mississippi Canal Co., 13 Wall. 166, 20 Law Ed. 557, and United States v. Lynah, 188 U. S., 445, 47 Law Ed. 539. Yet the decisions in these cases stand for the proposition that where real property, while not actually reduced to possession by the Government, has necessarily had its actual usefulness effectually destroyed by reason of the exercise of the power of eminent domain, a taking has resulted and compensation

is due. These conclusions are built upon the principle that where the sovereign power considers the general result to be accomplished is for the public good, the interest of the individual which must be sacrificed for the community purpose is to be measured not by the direct value to the public but by the value to the individual of the right taken. This, it is submitted, is the universal doctrine.

Approaching more closely the principle in the case now before the court, we find this court in Monongahela Navigation Company v. United States, 148 U. S., 312, 37 Law Ed. 463, announcing the proposition that: where an exercise of the sovereign power of appropriation at the same time necessarily destroys the value to the owner of an intangible contract right which depends for its value upon the free use, possession and disposition of the tangible property upon which it is founded, there also we have a taking of property for which compensation must be made.

In this case the Monongahela Company owned a charter granted by the state of Pennsylvania, empowering it to collect tolls, and in carrying into effect the powers granted it by its charter, the company had built a lock and dam. Congress thereafter passed an act for the condemnation of this property but made no provision in said act for the payment of compensation, for the charter, or the franchise privileges thereunder. Mr. Justice Brewer in delivering the opinion (p. 337 U. S. Reports; p. 472 Law Ed.) says:

> "And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess

and enjoy all the profits from the collection of the same tolls."

Again the court says at page 343:

> "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken."

In Long Island Water Supply Company v. Brooklyn, 166 U. S. 685, 41 Law Ed. 1165, a water company was possessed of its physical equipment, of franchises to operate, and of a contract with the city to supply the city with water. The water company protested condemnation proceedings on the ground that the taking of its plant and franchises constituted an interference with its contract to sell the city water and that such interference was violative of the constitutional prohibition of the impairment by a state of the obligation of contracts. Brewer, J., points out, however, that not only are the physical properties and the franchise property, but the *contract* is likewise property, even tho by such appropriation the State (in this instance the city) by its action with regard to the contract actually does nothing but destroy the value of the contract to the owner. This case on this point is cited with approval no less than five

mises in subsequent decisions by the court which rendered it.

In further support of our contention that the principle of law in the United States is that destruction of rights for public use constitutes a taking, we cite an international view of our law in a case in which a present member of this bench, acting as counsel for the United States, recently most ably contended to the contrary. Certain citizens of Norway were possessed of contracts for the building of fifteen ships in ship yards located in the United States. The United States Shipping Board in 1917 requisitioned the ship yards, the ships under construction and the rights of the Norwegians to have those ships constructed upon which work had not yet been started. Subsequently the United States Shipping Board cancelled the contract for three of the ships before their keels were laid. The claims of the Norwegians not having been adjusted to their satisfaction, a Tribunal of Arbitration between the United States and the Kingdom of Norway was arranged for under the terms of the Hague Convention of 1907. This Tribunal met at the Hague and there after exhaustive argument by Counsel for the United States and for Norway presented its opinion on October 13, 1922.

Counsel for the United States contended that the property of the claimants in their contracts "was an entity distinct from the material and other tangible things subjected to the property and that when the owner of the ship building contract continued to have the use and possession as before, the property is not taken in the constitutional meaning, however much it may be depreciated in value. They contended that this was a case of consequential damages which are not awarded in the United States." (Original p. 30 of the "Award of the Tribunal of Arbitration between the United States of America and the Kingdom of Norway under the Special Agreement of June 30, 1921.")

After consideration of many decisions of the Supreme Court of the United States cited by both sides, the Tribunal said (Original page 31 of the "Award of the Tribunal of Arbitration between the United States of America and the Kingdom of Norway under the special agreement of June 30, 1921"):

> "The Tribunal cannot agree with this contention of the United States. * * * The United States intended to 'take' and have 'taken' in fact the contracts under which the fifteen hulls in question were being constructed by American Shipbuilders in 1917. These contracts were the property, or created it, and what the United States call 'physical property' is only one of the elements or aspects of the 'property' under the municipal law of the United States, as well as under the law of Norway and other states.
>
> "It has been proved that the claimants lost the use and possession of their property through an exercise by the United States of their power of eminent domain. * * * As the United States have taken up the position and have acted in such a way that such transfer of the property implied cancellation or 'destruction' of the Jura in personam or in rem, it must be adjudged and awarded, in conformity with the American doctrine and jurisprudence itself, that this action of the United States is equivalent to the taking of private property as defined in the Fifth Amendment of their Constitution."

Here is an international tribunal technically unrestricted by the decisions of this court but finding itself bound to follow the cogency of its reasoning. Incidentally, we call attention to the announcement of the Tribunal that the doctrine for which we contend is valid "under the municipal law of the United States as well as under the law of Norway and other states." This general acceptation must be founded upon fundamental principles of equity, justice and expediency.

We call attention to another development of this destruction doctrine in a line of cases where there is hardly more than a destruction of contract rights, and where, in spite of the fact that the agent of the sovereign power gets none of the benefits held by the contractor, nevertheless compensation must be made for the loss. The first case is of value because we find the court working out the right answer by the sheer logic of its reasoning.

This is the case of Cornwall v. L. & N. Ry., 87 Ky., 72, 7 S. W., 553. The facts in this case were that the appellants dedicated to public use for a railroad right of way certain land, and as consideration for such dedication received a contract from the City of Louisville, by the terms of which the city agreed that no more of the appellants' property should thereafter be taken for public use. Subsequently, the L. & N. Railway began condemnation of more of the appellants' land and the appellants sued to enjoin the proceeding on the strength of their contract with the City of Louisville. The court held that the railroad's power to condemn could not be enjoined, saying in its opinion:

> "Appellants will not, as urged by counsel, have a right of action against the city of Louisville, for the contract has not been violated by it; nor does the appellee claim the right to take from appellants the additional land by reason of any authority conferred or stipulation contained in that contract, but solely under the statutory right, independent of and beyond anything contained in the contract. But as the unqualified exercise of that right necessarily involves a violation of a constitutional right that everyone has, to compensation for property taken for public use, is it not in the power and the duty of a Court of Equity in a case like this, to prescribe such terms as will do justice and assure to the property owner his right to compensation? If no such power resides anywhere, then we have a

> plain violation of an express provision of the constitution, which, though indirect, is just as palpable and injurious as if done directly."

The Court, in view of the fact that the taking of the land would destroy the value of the contract, directs the payment by the railroad for the land originally ceded by the appellants as consideration for the contract. In other words, the court holds that if the value of the appellants' contract is to be taken from them, they must be compensated for that value. This is the ruling we ask for in the case at bar.

In the case of Trustees v. City of Atlanta, 93 Ga. 468, the Atlanta University maintained a bridge over a street. By contract the City recognized this easement and promised to leave it perpetually undisturbed. The state granted the city a right "to open, lay out, widen, straighten and otherwise change streets." Under this the city undertook to have the bridge maintained by the University removed. Over the protest of the University, the court held the compulsory removal was lawful under the State's power of eminent domain provided the compensation paid comprehended not only the value of the property, but also the right to have it there. At p. 576, it is said "Reduced to its essence, a constitutional exercise of the right of eminent domain is not deprivation of property, but a compulsory exchange of one kind of property for another or rather a compulsory sale of property for money, an exchange of equivalent values."

This court is not without a decision similar in its essence to the two proceeding. We refer again to City of Cincinnati v. Louisville and Nashville R. R. Co., 223 U. S. 390; 56 Law Ed. 481. Here upon suit being instituted by the railroad to condemn a right of way over a public landing on the Ohio River, the City of Cincinnati filed a bill to enjoin the railroad from the erection of an elevated way. The

city's contention was based upon its contract with the dedicators of the land to preserve it for public use. Mr. Justice Lurton, delivering the opinion of this court, concedes the obligation of the contract and declares as an unchallenged proposition, that the power of eminent domain resting in the State is unimpaired by the existence of the contract, closing on this point by saying (p. 400 U. S. Reports; p. 483 Law Ed.) "If compensation be made no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases."

While the Georgia case just quoted from may be cited with West River Bridge v. Dix, 6 How. 507; 12 Law Ed. 535; Richmond, etc., R. R. v. Louisa R. R., 13 How. 71, 14 Law Ed. 45; Greenwood v. Union Freight R. R., 105 U. S. 13; 26 Law Ed. 961, and many others, as examples of the requirement that franchises granted may be condemned if compensation is made therefor, the Kentucky case and the decision given by Mr. Justice Lurton are examples of the taking by destruction of simple contracts for which the sovereign power must likewise make compensation.

Let us look now to those cases where there is a lease in real property sought to be requisitioned by the State.

The principle in the lessee cases is this: Where A is the owner and B the lessee, an appropriation by the state of A's property is a taking of B's property and B must be compensated as well as A. Kohl v. U. S., 91 U. S., 367, 23 Law Ed. 449; U. S. v. Inlots, Fed. (Ohio) Case No. 15,441a; In the matter of the City of New York, 120 Appellate Division 700.

The courts of New York have also held that a lessee is entitled to compensation when by the appropriation of the fee hold the lessee's right of renewal is destroyed. Matter of City of New York, 118 Appellate Division 865, affirmed 189 N. Y. 508. It will be noted that here we have

a value in the lessee which is over and above the total value of the property. It is also of interest to observe that the court pays no attention to the city's contention that it does not seek to use the lessee's property.

We suggest an analogy of this type of case to that at bar. In place of A, the fee holder, imagine the Allegheny Steel Company; in place of B, the lessee, put the appellant; in the place of the State demanding real property and the improvements thereon, put the United States demanding manufacturing capacity. Primarily, the fee and the manufacturing capacity are taken from A and the Allegheny Steel Company respectively, but secondarily the contract right of B, the lessee, and the contract right of the appellant, the purchaser, are taken and are destroyed. The state must compensate B; the United States must compensate the appellant.

An even closer analogy is to be found in three famous cases in the Court of Claims. The decisions referred to are those in Meade v. U. S., 2 Ct. Cl., 224; Gray v. U. S., 21 Ct. Cl., 340; Cushing v. U. S., 22 Ct. Cl., 1. In these cases the claimants, citizens of the United States, were the owners of substantiated and valid claims against foreign governments. The rights under these claims, if the court please, were property rights in the owners.

While these private individuals were in possession of the property rights in these claims, the United States Government, without consulting these property owners, surrendered, in treaties negotiated with the foreign powers against which these claims were held, all the rights the claimants had therein. By such action the United States realized certain benefits for the public use, these benefits being entirely divorced from the subject matter of the claim. In other words, to secure the treaty advantages the Government appropriated and destroyed everything of value in the claim-

ants' property. As a consequence, the Court of Claims held that all the claimants who diligently prosecuted their claims and gave proof of their ownership were entitled to compensation.

A further instance of the appropriation of a right of action existing independently of any physical taking is found in Morris Canal and Banking Corporation v. Townsend, 24 Barbour (N. Y.) 658. Here a landowner had a right of action against a canal company by reason of an overflow upon his property caused by the company's dam. The legislature subsequently passed an act authorizing condemnation and appointed commissioners to ascertain the value of land necessary to be condemned. The Commissioners determined the value of the chose in action residing in the landowner by reason of the original trespass committed before condemnation was authorized. The owner of the chose protests. The court decides that the word "property" as used within the Constitution of the State of New York (the clause being the same as that in the Fifth Amendment) includes the right of action accruing to the landowner for the trespasses by overflow occurring prior to the actual condemnation of the land. In other words, the right of action residing in the landowner was subject to the exercise of the power of eminent domain independently of the physical taking of his land provided adequate compensation was made therefor.

The principle in these cases of appropriation of choses in action goes much further than that for which the appellant contends and could be relied upon to support the contention that the United States in destroying the contract rights of the appellant to a portion of the manufacturing capacity of the Allegheny Steel Company for the year 1918, must compensate the appellant even tho the capacity of the Allegheny Steel Company were used for purposes wholly

divorced from those which the appellant's contract covered.

Fortunately, however, the plaintiff does not have to advance such a contention. The facts are that the United States seized the appellant's rights to priority in a definitely assigned portion of the entire manufacturing capacity of the Allegheny Steel Company for the year 1918, and then devoted that capacity to producing the very same plates of steel for which the appellant had contracted and produced this steel from the very raw material which had been purchased by the Allegheny Steel Company for the performance of the appellant's contract, a purchase which had been made possible by reason of the appellant's performance of its initial obligation under the contract. We stand upon the proposition that the United States by reason of prohibiting the performance of the appellant's contract with the Allegheny Steel Company and devoting the manufacturing capacity of the Allegheny Steel Company's plant for 1918 to the purposes of the United States took for the public use the property of the appellant; that the United States received a benefit from this property of the appellant; and that whether or not it received such benefit the destruction of the appellant's rights by the action of the United States constituted a taking within the meaning of the Fifth Amendment and compensation should be made therefor.

Third Assignment of Error

Returning to the third assignment of error, it has always been the understanding of this appellant that it was well established that when the United States lawfully took the property of an individual whose title was not contested that an implied obligation arose upon the part of the United States to pay for the said property. If the property right existed, as we submit it did, and if it was taken for public

use, as we submit, it was, then, on the authority of the following cases, the United States is under an implied contract to pay this appellant reasonable compensation.

United States v. Arthur Lynah, etc., 188 U. S. 445, 47 Law Ed. 539;

United States v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846;

Hollister v. Benedict & B. Mfg. Co., 113 U. S. 60, 28 L. Ed. 901;

U. S. v. Palmer, 128 U. S. 262, 32 L. Ed. 442;

U. S. v. Berdan Fire-arms Mfg. Co., 156 U. S. 552, 39 L. Ed. 530.

Fourth Assignment of Error

If we have established in the mind of the court the rightousness of our other contentions, the fourth assignment of error, i. e. that the court erred in sustaining the demurrer, should be by those contentions, maintained.

CONCLUSION

The appellant's rights in its contract with the Allegheny Steel Company purchased by a material consideration constituted property in the appellant within the meaning of the Fifth Amendment to the Constitution of the United States. The lawful acts of the officers of the United States in prohibiting the Allegheny Steel Company from carrying out its contract with the appellant and in requisitioning the manufacturing capacity of the Allegheny Steel Company constituted by appropriation and destruction a taking of the appellant's property within the meaning of the Fifth Amendment. The appellant is entitled to the compensation which it has not received. The United States is under

an implied contract reasonably to compensate the appellant for the property taken.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

OMNIA COMMERCIAL COMPANY, INC., appellant,
v.
THE UNITED STATES.

No. 229.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on appeal from a judgment of the Court of Claims dismissing appellant's petition on a demurrer challenging the sufficiency of the petition to state a cause of action against the United States. (R. 22; Op. Ct. Cl., R. 21–22.)

The salient facts set forth in the petition and relied upon as a basis for the claim asserted are these:

By virtue of an assignment of a contract the Omnia Commercial Company acquired the right to purchase from the Allegheny Steel Company 18,000 tons of steel ship plate at 6¼ cents per pound, to be delivered during the year 1918. (R. 3.) This right was con-

firmed by a direct contract between the two companies, executed August 23, 1917. (R. 3; Ex. VI, R. 15.)

On the day that it took this assignment, May 19, 1917, the Omnia Commercial Company contracted for the sale of this steel to the Vulcan Steel Products Company at $9.25 per cwt. (R. 3, 4; Ex. VII, R. 18.)

Thereafter, the Director of Steel Supply of the War Industries Board of the United States government notified the Allegheny Company that the United States required for public use the steel plate production capacity of that company, and, notwithstanding knowledge of that company's contract with the Omnia Company, refused to permit the carrying out of the contract, and threatened to confiscate the steel company's plant if it attempted to fulfill the same. (R. 4, 5.)

The theory of the petition is that by its action through the Director of Steel Supplies the United States took the property of the Omnia Company without due process of law in violation of the Fifth Amendment, the loss to the company thereby accruing being fixed at $990,000.

ARGUMENT.

Our argument will be divided into two main divisions, indicated by appropriate headings.

Even if the appellant's contractual rights constitute, under the circumstances disclosed, property within the meaning of the Fifth Amendment, the complaint nevertheless fails to state a cause of action, there being no allegation from which it can be determined what statutory authority existed for doing the things complained of.

It is true that §145 [1] of the Judicial Code gives the Court of Claims jurisdiction over claims founded upon the Constitution. But before the United States can be held liable for property taken for public uses by a government official, it must appear that this official had *statutory* authority to take the property. The mere taking of private property for public use is not enough. It is necessary that statutory authority be conferred. Otherwise the official's seizure amounts to nothing more than a tort, even though the property taken is devoted to a public use.

United States v. *North American, etc., Co.*, 253 U. S. 330.

Hooe v. *United States*, 218 U. S. 322.

It is now settled that the mere fact that a claim is founded upon the Constitution does not invest the

[1] "The Court of Claims shall have jurisdiction to hear and determine the following matters: First, all claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable," etc.

Court of Claims with jurisdiction. The existence of a contract, either express or implied, is a necessary element.

Basso v. *United States*, 239 U. S. 602.
Hooe v. *United States, supra.*
United States v. *North American, etc., Co., supra.*

Of course a contract to pay will, within certain limits, be implied where property is taken for governmental purposes pursuant to *statutory* authority.

Tempel v. *United States*, 248 U. S. 121.
Horstmann Co. v. *United States*, 257 U. S. 138.
Sutton v. *United States*, 256 U. S. 575.

This brings us to the question whether Replogle, the Director of Steel Supply of the War Industries Board, was invested with authority to do the things alleged. The complaint in substance charges that in September and October, 1917, he told the steel company that the government required its entire production for 1918, and that it must not, for that reason, carry out its contract with the plaintiff. The threat was made that if the steel company disobeyed, its plant would be confiscated. As a result of all this, it is alleged that the plaintiff's property (that is to say, its contractual rights) was taken for public use. Accordingly it is contended that the plaintiff is entitled to invoke the provision of the Fifth Amendment requiring just compensation.

But unless Replogle was in some way authorized by statute to do these things, it is clear, from the cases

just cited, that *his* unauthorized acts imposed no liability on the United States. The army appropriation act of August 29, 1916, provides for a Council of National Defense (39 Stat. 619, 649). This Council, on July 28, 1917, created, with the President's approval, a new board to which it gave the name War Industries Board.[2] This board, however, had only advisory powers.[3] Accordingly it is clear that

[2] The Official Bulletin of July 30, 1917, says: "The Council of National Defense has decided, with the approval of the President, to create a small body to be known as the war industries board. This board, in addition to other duties, will assume those formerly discharged by the general munitions board. The new board will be composed of seven members, working under the direction and control of the Council of National Defense and responsible through it to the President. * * * It will lodge responsibility for effective action as definitely as is possible under existing law."

[3] See "American Industry in the War. A Report of the War Industries Board," by Bernard M. Baruch, Chairman, Government Printing Office, 1921, being a report made to the President on March 3, 1921; "The War Industries Board remained a subordinate body to a council having advisory powers only. As necessities for its action arose, however, it developed and acted, relying on the one hand upon the support of the President, the Secretaries of War and the Navy, and other legally established agencies, and on the other hand upon the voluntary support of the business men of the country. For the most part there was cooperation and cordial good will, but sometimes legally responsible services of the government would be doubtful about their obligation or their right to defer to the determinations of a body possessing only advisory powers. Priority rules were promulgated, prices were fixed, and projects for vast increases in production were inaugurated on voluntary agreements with the industries. Success depended upon the cooperation of other branches of the government. Technically the Board had no administrative powers whatever at this time. It had no legal responsibility" (p. 24).

Again: "Legally, priority orders outside the sphere of transportation were, possibly, no more than requests; in fact, they usually were stated in the form of requests and their issuance was ordinarily in conformance with understandings reached through negotiations with the trade involved; but actually they had all the force and vigor of orders, since every concern affected knew that if it did not comply its supply of fuel might be cut off, its materials and supplies might not be received for transportation; or, its establishment might be seized by the government" (pp. 50-1).

Replogle was not vested with statutory authority to bind the United States.[4]

United States v. *North American, etc., Co., supra.*

One further matter remains to be considered. The complaint, it will be observed, contains, at one place, allegations of what Replogle, as director, etc., did, the allegation being that as a result of what *he* did on behalf of the United States, the latter took the plaintiff's property. Other allegations then follow in which all references to Replogle are avoided. The charge is merely made that the *defendants* did certain things. It is in substance alleged (p. 5) that the *defendants*, well knowing of the plaintiff's contract, continued, throughout 1918, to refuse permission to the steel company to fulfill its contract with plaintiff; and that the *defendants* continued, during 1918, to take the plaintiff's right of priority for public use, etc.

But it is submitted that these are mere *legal* conclusions, which are not admitted but on the contrary are expressly challenged by the demurrer.

These later allegations must be interpreted in the light of the allegations immediately preceding as to what Replogle did. They are not intended

[4] In the Court of Claims the plaintiff apparently argued that Replogle's acts were done under the Act of March 4, 1917 (39 Stat. 1169, 1193), and under the Act of June 15, 1917 (40 Stat. 182, 183). At any rate, we find in the government's brief filed in that court a statement to the effect that these acts are the ones under which the officers of the United States are declared to have proceeded, and that upon them the plaintiff must rest its claim. But whether this statement of the plaintiff's attitude is correct is a mere matter of conjecture. The plaintiff at least fails to apprize us under what statute, if any, Replogle acted. And the appellant in its brief in this court fails to point out the statutory authority on which it relies.

to set forth additional facts as constituting, separate and apart from everything else, an independent ground of recovery. They are merely inserted by way of amplification. The language is that the defendants, well knowing of the plaintiff's contract, *continued* to refuse, etc. The words must be interpreted as meaning that the United States continued, throughout 1918, to refuse permission to the steel company to carry out its contract with plaintiff *because* of what Replogle had done in 1917.

We accordingly submit that the case is not ruled by *Portsmouth, etc., Co.* v. *United States*, decided December 4, 1922. On the contrary, it is ruled by *United States* v. *North American, etc., supra;* and while that case was not decided on a question of pleading, it seems to us that its necessary deductions lead to the conclusion that the complaint now under review is a bad one.

Furthermore, the complaint is bad in that it fails to allege any facts from which even an implied contract to pay can be inferred. If any inference can be drawn from the allegations, it is to the effect that the United States *declined* to recognize that the plaintiff had any rights which the government was bound to respect, thus expressly negativing the theory of an implied contract. Particularly is this true in the light of the rule that a pleading, if ambiguous, is to be taken most strongly against the party who prepares it. The allegation is made that although Replogle well knew of plaintiff's contract, the defendants nevertheless made no offer of compensation; also that

the defendants, though often requested so to do, totally *refused* to pay the plaintiff compensation. This, we submit, is a tacit avowal that the United States refused to make compensation because it conceived that it was under no legal obligation to do so. Under such circumstances there can be no implied contract.

Tempel v. *United States*, *supra*.

Aside from any question whether the complaint is bad in the respects just discussed, it is clear that there was no taking of the appellant's property within the meaning of the Fifth Amendment.

It is manifest that the United States never asserted any right or property under the appellant's contract. It did not demand of the Allegheny Company any performance of any of the terms of the contract for the benefit of the United States. It did not claim to be subrogated to the rights of the appellant in the contract. It did not "take" appellant's contract.

The theory under which appellant presses its claim is that the action of the United States in preventing the fulfillment of the *contract* which appellant had with the Allegheny Company for 18,000 tons of steel plates, and in requisitioning the manufacturing capacity of the latter company, constituted a taking of appellant's property for which it should have compensation.

We assert, however, that the fact that the contract was made unenforceable and incapable of fulfillment

did not give rise to a valid claim against the government.

Every contract such as the one here in question is entered into subject to the possibility that the sovereign may render it unenforceable or impair its value. The power of the sovereign to regulate (especially in war time) industries affected with a public interest must necessarily be unaffected by the existence of contracts entered into prior to such regulations.

L. & N. R. Co. v. *Mottley*, 219 U. S. 467, 480–486.

Union Dry Goods Co. v. *Georgia Pub. Service Corp.*, 248 U. S. 372, 375, 376.

Marcus Brown Co. v. *Feldman*, 256 U. S. 170, 198.

Levy Leasing Co. v. *Siegel*, 258 U. S. 242, 249.

But the impairment of a contract or action making it incapable of fulfillment or enforcement, by legislation of the kind here presented, does not afford any basis for a claim for compensation under the Fifth Amendment. It is not an exercise of the power of eminent domain.

Legal Tender Cases, 12 Wall. 457.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146.

Jacob Ruppert v. *Caffey*, 251 U. S. 264.

C. B. & Q. Ry. v. *Drainage Com'r.*, 200 U. S. 561.

Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548.

In the *Legal Tender Cases*, 12 Wall. 457, this court, in disposing of the objection that the legal tender Act violated the spirit of the Fifth Amendment, said (p. 551):

> That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a nonintercourse act, or an embargo be enacted, or a war be declared? By the Act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent was taken from the weight of each dollar. The effect of this was that all creditors were subject to a corresponding loss. The debts then due became solvable with six per cent less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law?

In *Morrisdale Coal Co.* v. *United States*, decided May 29, 1922, it was held that a coal company whose business during the war was regulated by the govern-

ment was not entitled to recover of the latter for loss which accrued because the interposition of the government prevented it fulfilling contracts for its products whereby it would have received more than it did under sales at the price fixed by the government.

The case at bar is not different in principle. It and the *Morrisdale* case proceed fundamentally upon the proposition that the government prevented the fulfillment of a contract. If the Morrisdale Company could not recover from the government, much less would recovery be possible by this appellant with whom the government had no dealings at all.

The contract, it will be observed, expressly provided for the very contingency that afterwards arose. The appellant made a bargain with the steel company on the express condition that the latter should not be liable if it was disabled from carrying out its contract by reason of governmental seizure or other contingencies beyond its control.[3] Even if these conditions had not been inserted, the law would have read similar ones into the contract.

> 3 Williston on Contracts, §§1935, 1938, 1948, 1951.
>
> *The Kronprinzessin Cecelie*, 244 U. S. 12.

We thus have the novel situation of a party endeavoring to fasten liability on the government,

[3] The contract reads: "The seller shall not be liable for any loss or damage caused by fire, differences with employees, accidents, government seizures, embargoes (railroad or otherwise), or stoppages or contingencies beyond its control, and any of such causes shall be sufficient reason or excuse for any delay caused thereby." (R. 16.)

although confessedly unable to recover from the person with whom it contracts.

It is clear that if the steel company's plant had been destroyed by the tortious act of a third party, the appellant would have had no cause of action against the latter.

Byrd v. *English*, 117 Ga. 191.

And even if a third party had induced the steel company not to carry out its contract, no cause of action against that party would have arisen unless the act was *maliciously* done. In other words, if a third party had, without malice, induced the steel company to deliver to him its entire steel production in 1918, the appellant could not have recovered damages against such party, even though the latter had known that the necessary effect of his conduct would be to disable the steel company from carrying out its contract with the appellant.

Angle v. *Chicago, etc., Ry. Co.*, 151 U. S. 1.

Nor would the appellant have any cause of action against third parties if the steel company had been disabled from carrying out its contract by reason of its plant being dynamited and destroyed by such parties to prevent the spread of fire.

Bowditch v. *Boston*, 101 U. S. 16.

And if the town where the steel company's plant is located had entered into a contract with a water company under which the latter was obligated to install hydrants for protection against fire, the failure of the water company to carry out its contract

with the town would have given neither the appellant nor the steel company a right of action against the water company if the steel company's plant had been destroyed by a fire which would have been averted if the hydrants had been installed.

> *German Alliance Ins. Co.* v. *Home Water* Co., 226 U. S. 220.

Much less therefore can it be said that inability on the part of the steel company to fulfill its contract gives the appellant a right, under the Fifth Amendment, to a cause of action against the United States merely because the latter, in the exercise of a concededly lawful war power, makes performance impossible by calling upon the steel company to deliver to it, for war purposes, its entire steel production.

The following cases, it seems to us, support the view that there was no taking within the constitutional sense:

> *Transportation Co.* v. *Chicago*, 99 U. S. 635.
> *Jackson* v. *United States*, 230 U. S. 1.
> *Hughes* v. *United States*, 230 U. S. 24.
> *Peabody* v. *United States*, 231 U. S. 530.
> *Richards* v. *Washington Terminal Co.*, 233 U. S. 546.
> *United States* v. *Cress*, 243 U. S. 316.
> *Bothwell* v. *United States*, 254 U. S. 231.
> *Portsmouth, etc., Co. et al.* v. *United States*, decided December 4, 1922.

Indeed if the appellant's contention is allowed to prevail, it will necessarily follow that if, in the exercise of its admittedly lawful war power (*Selective Draft*

Law Cases, 245 U. S. 366), the United States compulsorily inducts into the military service a person who is bound by contract to render personal services to another for a term of years, thus disabling the person so inducted from carrying out his contract, it must therefore compensate the person to whom the services are owing, as well as the person obligated to render the services, because *contractual* rights have been taken within the meaning of the Fifth Amendment.

But it is said that appellant, pursuant to the requirements of its contract, posted credit for the benefit of the Allegheny Company, as a result of which that company was enabled to purchase large quantities of raw materials which, but for the intervention of the United States, would have been fabricated into the steel plates which it had agreed to deliver to appellant. Upon this premise, a claim is put forth that the United States actually took tangible property of appellant for which no compensation has been made. (R. 5.)

But the contract was for delivery of steel plates. The rule is well established that an agreement for future delivery of articles to be manufactured is an executory contract and title to the finished product does not pass to the buyer until delivery. *Clarkson* v. *Stevens*, 106 U. S. 505, 513–516; *Northwestern State Bank* v. *Silberman*, 154 Fed. (C. C. A.) 809; *Hartley* v. *Lapidus & Holub Co.* 216 Fed. (C. C. A.) 92, 98.

Therefore, no claim is tenable that the steel plates when fabricated belonged to appellant.

Neither does the fact that credits were posted by appellant help it, for that would not create a title in it to the materials. *Clarkson* v. *Stevens, supra.*

It is clear that whatever property was taken belonged to the Allegheny Company, and the government's liability was to that company, not to appellant.

The judgment, it is submitted, should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

OMNIA COMMERCIAL COMPANY, INC.,
Appellant,
vs.
THE UNITED STATES

No. 229

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF FOR THE APPELLANT

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STATEMENT

Opposing counsel fail to recite in their statement of facts that appellant's petition alleged:

1. That the contract rights taken from the appellant were purchased for a substantial consideration actually paid by appellant's predecessors. This purchase gave to the appellant's rights a material, not imaginative, value.

2. That the appellant posted $2,300,000 in letters of credit for the performance of its contract; a circumstance greatly enhancing in value to the Government the rights taken.

3. That the Government after the initial taking continued to refuse to permit any deliveries to be made to the appellant under its contract with the Allegheny Steel Company

and continued to take the rights of the appellant under its contract until some time after November 11, 1918.

ARGUMENT

Opposing counsel contend (p. 2 Brief) that:

The complaint fails to state a cause of action, there being no allegation from which it can be determined that statutory authority existed for doing the things complained.

Four different contentions are made under this heading. We enumerate our replies.

I. In support of the argument that the complaint must allege the statutory authority of the agent of the government, opposing counsel's brief cites:

> *United States vs. North American, etc., Co., 253 U. S. 330; 64 L. ed. 935.*
>
> *Hooe vs. United States, 218 U. S. 322; 54 L. ed. 1055.*

The brief admits (p. 7) that these cases were not decided on a question of pleading. As a matter of fact, they were both decided on appeals from judgments of the Court of Claims rendered upon petition and traverse, the submission of evidence, argument by counsel thereon and a finding of facts.

The first case, *United States vs. North American, etc., Co.*, decided that: without the performance by the Secretary of War of the antecedent action prescribed by the statute, an army officer did not act within his authority, given by that statute, in appropriating for a military reservation land containing a placer mining claim. This opinion states the law upon which the present appellant has built its case and there is not one reference in the opinion to the contents of a petition or a single proper inference from the decision that

a claimant must present, *in his petition*, his evidence of authority for an agent's acts.

The case of *Hooe vs. United States, 218 U. S. 322, 54 L. ed. 1055*, is again a decision from a judgment from the Court of Claims rendered upon a petition, a traverse, evidence taken and a finding of facts. The claimants, in their evidence submitted, were unable to establish the authority of an executive officer to bind the United States and the claim was denied. Here again the opinion neither by direct reference nor by inference deals with the question of the contents of a petition.

These are both decisions of the substantive law; not adjective. The theory of the appellant's case is in full accord with them. All the appellant seeks is an opportunity to present its evidence establishing the authority of the Government and its agents. This it cannot do without the reversal of the judgment below.

Section 159 of the Judicial Code, which prescribes the content of petitions in the Court of Claims, directs no specification of the authority under which an agent of the government acts; neither do the rules of the Court of Claims. In fact, the Court of Claims, while strict in its requirements as to the pleading of jurisdictional facts, has refused to be bound by strict rules of pleading and has always inquired as to substance in preference to form.

> *U. S. vs. Burns, 12 Wall. 246, 254; 20 L. ed. 388, 390.*
> *Murray vs. U. S., 46 Ct. Cl. 91.*
> *Brown vs. District of Columbia, 17 Ct. Cl. 303.*
> *Morse Arms Mfg. Company's case, 16 Ct. Cl. 296.*
> *Pierce vs. United States, 1 Ct. Cl. 195.*

These established principles hardly should be departed from when the omission in the complaint alleged by coun-

sel's brief could work a hardship on no one. The authority of the official is, of necessity, a public record. Counsel could scarcely be surprised by the production at the trial of the evidence of the statutes. Surely the facts alleged in the complaint are sufficient, without the specification of statutes, to advise counsel what demands must be met. Subject to the rule that the proof must correspond with the allegations, the allegations of the complaint are in sufficient detail to give the Government the benefit of the principle of *res judicata*. These considerations indicate why the Court of Claims, in sustaining the demurrer, made no reference to the present contention of counsel.

This court has already denied that a declaration must set out the authority of an agent or even aver it.

> *Bank of the Metropolis vs. Guttschlick, 14 Peters, 19, 27; 10 L. ed. 335, 339.*

This court has likewise held that a general allegation of agency is sufficient, without an averment that the agent had authority to act in the premises. In fact, Mr. Justice Story has expressely said, in the case of a suit brought against a principal for a note made by this agent, that:

> "The note might have been declared on as the note of the principal, according to its legal operation, without noticing the agency; and though it would have been technically more accurate to have averred that the principal, by his agent, in that behalf duly authorized, made the note, yet it is not indispensable; for if he makes it by his agent, it is a necessary inference of law that the agent is authorized, for otherwise, the note would not be made by the principal; and that the demurrer itself admits."
>
> *Childress vs. Emory & McClear, 8 Wheat. 642, 670, 5 L. ed. 705, 712.*

[illegible] upon which this claim arose are described in the petition in thirteen instances as those of "the defendants" without reference to any agent. In two instances (Transcript of Record, p. 4, line 9 of the first paragraph beginning thereon and line 2 of the second paragraph beginning on the same page) the description is, "The defendants, through one of their agents for the purpose, one J. Leonard Replogle, Director of Steel Supply of the War Industries Board of the United States Government." It is common knowledge that the United States always act through agents. Therefore, when it is alleged that "the defendants" acted or failed to act, the very filing of the general demurrer admits, for the purpose of the demurrer, the authority of the agent. Where the agent is described as "one of their agents for the purpose," the demurrer admits that he is an agent for the purpose and counsel should not now be heard to argue that their demurrer was a denial of the allegation.

Thus, from the standpoint of the governing statute, the rules and the established principles of the Court of Claims, the decisions of this court on similar questions of pleading and from the result as a practical matter, the failure to allege in the complaint the specific authority of the agents of the United States does not give a basis for affirming the judgment sustaining the general demurrer.

II. In further support of its contention that the complaint fails to show the authority of Replogle, Director of Steel Supply of the War Industries Board, counsel (p. 4, Brief of United States) cite the authority under which they suppose Replogle acted.

In reply thereto we offer the following. The act of August 29, 1916, c. 418, Section 2, 39 Stat. 649, 1916 U. S. Comp. Stat., Sec. 3115a-d, provides for a Council of National Defense "for the coordination of industries and re-

sources for the national security and welfare" and to effect the "creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the nation." The Council is directed to adopt rules and regulations, which rules shall be subject to the approval of the President, for the conduct of its work. Power is given to organize subordinate bodies for its assistance.

The Secretaries of War and of the Navy, together with the Secretaries of Interior, Agriculture, Commerce and Labor were constituted members of this Council and approved its orders. (See Circular Number One of the War Industries Board, issued September 21, 1917.)

The War Industries Board was created July 28, 1917 (See Brief for the United States, p. 4), as a subordinate body of the Council. The War Industries Board under orders of the Secretary of War, Chairman of the Council, said orders being issued with the approval of the President, undertook the assigning of priorities in the manufacturing of steel products in the United States. (First Annual Report of the Council of National Defense, November 21, 1917, p. 117.)

On September 21, 1917, the War Industries Board issued a circular putting into written published effect the existing plan of priority directions to manufacturers. This publication was approved and signed by the Secretary of War and the Secretary of the Navy (See Circular Number One of the War Industries Board, September 21, 1917, and the First Annual Report of the War Industries Board, supra).

J. Leonard Replogle was a member of the War Industries Board (War Industries Board Circular No. 1, September 21, 1917).

The directions given by members of the Priorities Committee of the War Industries Board, under the Council Chairmanship of the Secretary of War, in accordance with

tions [illegible] approved by the President, were mandatory under the authority of the Act of June 3, 1916, c. 134, Sec. 120; 39 Stat. 213, 1916 U. S. Comp. Stat., Sec. 3115g;[1] also the act of March 4, 1917, c. 180, 39 Stat. 1192;[2] (substantially re-enacted July 1, 1918, c. 114; 40 Stat. 719;) and

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Note. "The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and *shall take precedence over all other orders and contracts theretofore placed* with such individual, firm, company, association, corporation, or organized manufacturing industry. * * *" Act of June 3, 1916, c. 134, Sec. 120; 39 Stat. 213; 1916 U. S. Comp. Stat. 3115g.

[1] Note. "(b) That in time of war, or of national emergency arising prior to March 1, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law;

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, *to modify or cancel any existing contract for the building, production, or purchase of* ships or *war material;* and if any contractor shall refuse or fail to comply with the contract as so modified, the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. *To cause the owner* or occupier *of any factory in which ships or war material are built or produced to place at the disposal of the*

the act of June 15, 1917, c. 29, Sec. 1, 40 Stat. 182* (re-enacted with additions April 22, 1918, c. 2, and November 4, 1918, c. 201, 40 Stat. 1022).

United States the whole or any part of the output of such factory, and within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract with the owner or occupier of such factory.

* * * * * * * * *

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory, or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b) it shall make just compensation therefor to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-two of the Judicial Code." Act of March 4, 1917, c. 180; 39 Stat. 1192.

* NOTE.—"The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) *To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material,* * * *

(c) *To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantity and at such times as may be specified in the order.*

(d) * * * to requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

* * * * * * * * * *

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production

That Replogle's acts under such authority were sufficient to prohibit the performance by the Allegheny Steel Company of the appellant's contract there can be no doubt.

Roxford Knitting Co. vs. Moore & Tiernay, 263 Fed. 177. Writ of certiorari denied; 253 U. S. 498; 64 L. ed. 1031.

III. The brief of the opposing counsel (p. 6) states that the allegations in the complaint that: "the defendants ordered the Allegheny Steel Company to fill only such orders as would be given it by the defendants and to hold its plant production for the year 1918 at the complete and absolute disposal of the defendants;" and "the defendants, though well knowing and admitting the right, title and property of the plaintiff in its contract * * * throughout the year 1918, up to and including the eleventh day of November of that year and some time thereafter, continued to refuse to permit the said Allegheny Steel Company to fulfill its contract aforesaid with the plaintiff." are not intended to set

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of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by Section twenty-four, Paragraph twenty, and Section one hundred and forty-five of the Judicial Code." Act of June 15, 1917, c. 29, Sec. 1; 40 Stat. 182.

forth additional facts as constituting, separate and apart from everything else, an independent ground of recovery.

Counsel are mistaken. Contrary to their interpretation these allegations were intended to set forth additional facts (not legal conclusions) constituting ground for recovery. That these continuing acts of the defendants do constitute ground for recovery see the cases cited in Brief for the United States, pp. 3 and 7, i. e.

> *United States vs. North American, etc., Co. 253 U. S. 330; Portsmouth, etc., Co. vs. United States, decided, December 4, 1922.*

The authority for the alleged direction of the United States to the Allegheny Steel Company to fill only orders given it by the agents of the United States and not to fill the contract with the appellants rests not only upon the statutes and regulations heretofore cited, empowering J. Leonard Replogle to act, but upon the executive order of the President of March 4, 1918, directly defining the functions of the War Industries Board[1] and the Act of May 20, 1918, c. 78, Secs. 1 and 2, 40 Stat. 556; 1916 U. S. Comp. Stat (Suppl. 1919) Sec. 283a.

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[1] NOTE.—"* * * No. 5. The determination wherever necessary of priority of production and of delivery and of the proportion of any given article to be made immediately accessible to the several purchasing agencies when the supply of that article is insufficient either temporarily or permanently." Executive Order March 4, 1917. Second Annual Report of the Council of National Defense, 1918, p. 118.

[2] NOTE.—"(Act May 20, 1918, c. 78, 40 Stat. 556.)

SECTION 1. For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office or officer,

counsel declares the complaint is so drawn that it alleges no facts from which a contract may be implied. This contention is: that the refusal of the executive officers of the United States to pay compensation, constitutes a disavowal of any rights in the appellant which the Government was bound to respect and as a consequence there could be no basis for an implied contract.

It is submitted that the case of *Temple vs. United States, 248 U. S. 121; 63 L. ed. 162*, is not in point. That case was one where the claimant alleged that the Government, in dredging a submerged channel in the Chicago river, took the land of the claimant, a riparian owner. The answer specifically denied title in the claimant and asserted title in the Government for the purpose of improving navigation. The opinion comments repeatedly upon this denial of *title in the claimant*, declaring that in the face of such a contention, it was impossible to imply a contract in fact.

In the case at bar, the complaint states in three places that

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in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: Provided, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: Provided further, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this Act and during the time that this Act is in force: Provided further, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war.

SEC. 2. In carrying out the purposes of this Act the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to consolidate the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto." Act of May 20, 1918, c. 78, Sec. 1 and 2; 40 Stat. 556; 1916 U. S. Comp. Stat. (Suppl. 1919) Sec. 283a.

the defendants, though "well knowing and admitting the right, title and property of the plaintiff in its contract," committed the acts complained of. This is not a legal conclusion: it is an allegation of fact. If the general demurrer admitted anything it would seem to have admitted this allegation. It is elemental that a denial of this allegation should have been made by a traverse.

To infer a denial of title in the plaintiff as the only basis for a refusal to pay upon the part of the executive officers of the United States is wholly untenable. The amount asked for, the citizenship of the claimants, their counter obligations to the United States, and any other of a dozen or more reasons, might have influenced the executive officers of the United States to refuse payment. If the appellant's title is contested let the point be raised by traverse; not be admitted by demurrer and then debated.

In conclusion on the contention in the Brief for the United States that the demurrer was properly sustained because authority for defendants' acts was not specified therein, we submit that we have demonstrated that:

The cases cited by opposing counsel for the proposition that the petition must specify the statutory authority of the agents of the United States are decisions rendered upon petition and traverse, evidence submitted, arguments of counsel thereon, and a finding of facts; neither directly nor by inference do they express an opinion as to the necessity of specifying, in the petition, the agent's authority;

Neither the Judicial Code, the rules of the Court of Claims, nor the decisions of that court nor this, require any such specifications in the petition; indeed such a requirement is foreign to the pleading principles of the Court of Claims;

This court has held that a general allegation of agency is sufficient, without averment of the agent's authority;

The filing of the demurrer admits, for this purpose, the truth of the averment of authorized agency;

Counsel are mistaken as to the authority upon which the agents of the United States acted; their authority was complete;

The very cases cited by counsel in opposition are authorities for constituting an allegation of continued acts by the United States, an allegation of a taking;

The allegations in the petition directly affirm the admission by the United States of title in the appellant and thus lay the basis for a contract implied in fact.

The second principal contention of opposing counsel (Brief for the United States, p. 8) is that:

There was no taking of the appellant's property within the meaning of the Fifth Amendment.

We will answer the supporting arguments in turn.

I. Counsel declare that every contract is entered into subject to the possibility that the sovereign may render it unenforceable or impair its value and then cite four cases (Brief of the United States, p. 9) to the effect that the power of the sovereign to regulate cannot be impaired by the existence of prior contracts. These cases, in order of their citation, hold: that the power of Congress to regulate interstate commerce cannot be abridged by contracts made prior to the regulation; that the power of a state to regulate public service corporations cannot be abridged by such means; that neither the power of Congress nor the power of a state, existing in times of peculiar emergency to control housing, can be so abridged. Unfortunately these cases cast no light on the present question. They all arose as a result of the *challenge* of the authority to regulate; the appellant, in the case at bar, *affirms the authority* to appropriate. In the cases cited, the regulating power took to its own use nothing which the citizen had; in the case at bar the Government took to its own use the very essence of the rights of which the appellant was possessed. In the cases

cited the sovereign said, "You shall use your property thus." In our case the sovereign said, "You shall not use your property; your rights therein are appropriated for public use."

Of the next five cases cited by counsel, the *Legal Tender Cases (12 Wall 457)*, *C. B. & Q. Ry. vs. Drainage Com'r. (200 U. S. 561)* and *Atlantic Coast Line vs. Goldsboro (232 U. S. 548)* are further instances of regulation upon the same principle that the proper power to regulate shall not be abridged by contracts existing prior to the regulation. *Hamilton vs. Kentucky Distilleries Co. (251 U. S. 146)* and *Jacob Ruppert vs. Caffey (251 U. S. 264)* are two of the so-called "liquor" cases, where regulation of property forbids its eventual use but provides not only an opportunity for disposition of the property before its use becomes unlawful, but in no wise appropriates the rights in the property to the interdicting power.

In all the nine cases cited by the opposing counsel the courts, in upholding the power of regulation challenged, point out that the injuries complained of by the property holder are a mere consequence of the regulation of the manner in which he may use his property. The regulating power neither takes to itself the owner's property nor forbids his use of it in order that the sovereign may use it.

The case of *Morrisdale Coal Company vs. United States, decided May 29, 1922*, cited by opposing counsel (Brief for the United States, pp. 10, 11), is quite distinct from that at bar. There under statutory authority, we find the Government *regulating* the price at which coal should be distributed. Power to invalidate contracts in which prices had been fixed prior to the passage of the statute is not granted. The plaintiff did not allege the receipt of an unreasonable price under the Government order. The failure to make this allegation was an omission which barred the claim from relief within the statutory provisions. From this we may fairly assume

that the regulation of the Morrisdale Company's property in its contract included a reasonable compensation for those rights. In appellant's case its rights in its contract were not *regulated* by the Government; they were abrogated. In the case at bar the appellant was not advised that in view of the public interest it must exercise its rights within a certain price limitation; it was prevented from exercising them in any wise.

In the statute upon which the *Morrisdale* case was decided (Act of August 10, 1917, Chap. 53, Sec. 25, 40 Stat. 276, 284) Congress specifically excepted from its grant of power the regulation of prices so as to invalidate "any contract in which prices are fixed, made in good faith, prior to the establishment of and publication of maximum prices by the Commission." In the case at bar the President was given power, "to modify or cancel any existing contract for the building, production or purchase of ships or war material" and it was provided that, "whenever the United States shall cancel or modify any contract * * * it shall make just compensation therefor," Act of March 4, 1917, c. 180, 39 Stat. 1192. (See page 7 of this reply brief.) Again the President was empowered "To modify, suspend, cancel, or requisition any existing or future contract for the building, production or purchase of ships or material," and again it was provided that: "Whenever the United States shall cancel, modify, suspend or requisition any contract * * * it shall make just compensation therefor * * *," Act of June 15, 1917, c. 29, Sec. 1, 40 Stat. 182. (See p. 9 of this reply brief.)

It will be seen that in the Morrisdale case, Congress carefully forbade the modification, suspension or cancellation of existing fixed price contracts, whereas in the case of material for ships (the subject matter of the appellant's contract) authority was granted to destroy such contracts provided

just compensation was made. The appellant had such a contract; for the rights in that contract it paid a material, valuable consideration. All the appellant wants is to be paid for these rights which were taken as it is provided the appellant should be paid in the statutes enacted by reason of the restriction contained in the Fifth Amendment.

II. Counsel contend that (Brief for the United States, pp. 12-13) somewhat similar acts to those complained of here would not make a private individual liable for his actions to the appellant. Granting, for the argument, that the cases referred to are authorities for the propositions for which they are cited, we do not see how they are of any aid to the court in settling the issue now before it.

The question in this case at bar is whether the facts alleged in the petition come within the general principle that, if admitted private property is appropriated for the public use by properly authorized agents of the United States the owner of the property must be compensated. The cases between private parties cited by opposing counsel do not operate upon this principle at all. The courts there are led by the entirely different fundamental consideration of private relationships. Facts which are only roughly similar to those at bar are applied to standards entirely dissimilar. The result does not help. For this reason the appellant has refrained from quoting in its behalf decisions on the controversies between private parties where the results are different than in those cases cited by opposing counsel. With due consideration for the analogies inferred by counsel in those cases dealing with private relations we suggest that this court will be burdened rather than assisted if invited to make such an inquiry.

III. On page 10 of their brief opposing counsel cite eight cases for the general proposition that there was no taking within the constitutional sense. These cases will be commented upon and distinguished in oral argument.

IV. The contention is advanced by counsel that if the appellant is permitted to prevail on this appeal, that when the United States compulsorily inducts into military service a person bound by contract to render personal services to another for a term of years, the person to whom the services are owing must be compensated.

In the first place, even if this were true, we submit that the prospect of such a supposed ruling should constitute no reason why this appellant should be denied the justice to which the law entitles it. The small group of individual stockholders in the appellant corporation had rights measurable in terms of current market value. To obtain these they surrendered valuable property, tangible and intangible, worth upwards of three million dollars. This property the public need required to be destroyed and appropriated to the public use. There has been an injury, by which the rest of us benefited, suffered by these men. They can look nowhere for remedy but to our Government. That Government is obligated, in view of the existing decisions of this court, to compensate them regardless of what would be the outcome of a different case arising under different circumstances and different statutes.

If the case put by counsel should ever arise in this court, we suggest the application to it of the circumstances in the case at bar. First, it should be shown that the obligation to labor for a term of years arose as the result of a substantial and material consideration paid out; second, that the services promised be of such a character that there is no opportunity whatever to secure them elsewhere; third, that the product of the obligated individual's services be sold in advance to financially responsible parties. If these elements appear, then turn the case over to the Court of Claims for a determination, as a fact, of the extent of the claimant's injuries. If, in such a case, subject to the inherent infirmi-

ties of proving the value of a contract for personal services, the claimant can prove actual and not speculative injuries, then he should be compensated; for surely his property has been taken.

It is submitted that the control of the situation in the hypothetical case and indeed, in the case at bar, lies not in the denial of the logically demonstrated conclusion that the claimant's property was appropriated for public use, but in the award of damages for his actual injuries. Let the Court of Claims determine, subject to the highly restrictive doctrines of that Court, the extent of the injury sustained. Then, if in fact it be found that the United States has indeed injured its loyal citizens by its appropriation of their rights, let just compensation be made to them.

In summary of our reply to the contention that the appellant's property has not in fact been taken, we submit that:

(1) *The cases cited in the brief for the United States refer to regulation, not appropriation, by the sovereign;* (2) *the cases cited on remedies for injuries caused by private parties are but approximately analogous in fact and not at all in principle;* (3) *the hypothetical case supposed by consul, if limited by the facts in the case at bar and by its own infirmities, is properly controllable by the determination of the extent of compensation due and constitutes no bogey of precedent to prevent this court's allowing this appellant to introduce the evidence of its injury.*

It is respectfully submitted that the judgment should be reversed.

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OMNIA COMMERCIAL COMPANY, INC., *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 229. Argued March 1, 1923.—Decided April 9, 1923.

1. A valuable contract right is property within the meaning of the Fifth Amendment, and when taken for public use must be paid for by the Government; but when it is lost or injured as a consequence of lawful governmental action not a taking, the law affords no remedy. P. 508.
2. When the Government, for war purposes, requisitioned the entire production of a steel manufacturer, rendering impossible and unlawful of performance an outstanding contract between the manufacturer and a customer, the customer's rights were not taken by the Government, but frustrated by its lawful action. P. 511.

56 Ct. Clms. 392, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a petition on demurrer.

Mr. George Maurice Morris, with whom *Mr. Frederick N. Watriss*, *Mr. Melvin G. Palliser* and *Mr. William S. Thompson* were on the briefs, for appellant.

In the year 1916, five associated individuals owned machinery, mill equipment, structural steel, real property, water and rail rights, all in condition for the erection and operation of a steel plate mill. After months of negotiations, the associates sold, in May, 1917, all their rights in these assets to the Allegheny Steel Company of Pittsburgh, Pennsylvania. The agreed value of these properties was $3,705,000. The consideration moving from the Allegheny Steel Company was to be paid, $500,000 in cash and the remainder in 58,000 tons of steel plate to be delivered to the associates' order in equal monthly instalments during 1918 upon the payment by the associates of a price $3,205,000, below the minimum market value of such plates.

The associates then formed two corporations in which they were the sole stockholders, officers and directors. These corporations succeeded to the rights of the associates in their contract with the Allegheny Steel Company for 1918. To the appellant corporation was conveyed the right to receive 18,000 tons of the total 58,000 tons.

The contract between the appellant and the Allegheny Steel Company required the posting of letters of credit in favor of the Allegheny Steel Company. The appellant posted $2,370,000 in such letters in due season and form. These letters of credit enabled the Allegheny Steel Company to procure and it did procure the raw materials necessary to perform its contract with the appellant. The appellant then sold the entire 18,000 tons of plate due under its contract to responsible parties who established satisfactory credits.

By reason of the subsequent taking by the United States, the loss of the appellant was $990,000. This was the value of the consideration paid by the assignors of the appellant to the Allegheny Steel Company for the appellant's contract with that company.

Rights under a lawful and binding contract constitute property in the holder and are property within the Fifth Amendment.

By reason of its contract, the appellant acquired, in addition to those rights common to all purchasers under a contract, the right to receive the finished product; the right to specify, within the capacity of the seller's mills, the gauge and size of the steel plate rolled; the right to inspect the product as it should be manufactured; the right to pay for the plate delivered at the times and in the manner provided; the right to specify the place of delivery; and, finally and most important, the right to have the plate delivered during the year 1918 in approximately equal monthly quantities. To the appellant was assigned 18/58 of the expected entire production of the Allegheny Steel Company for the year 1918.

It should be apparent that, by reason of its contracts with the assignors of the appellants, the Allegheny Steel Company was richer in equipment capacity and credit to the extent of $3,200,000. By reason of the preliminary performance by the appellant of its contract with the Allegheny Steel Company the latter had purchased sufficient raw materials to manufacture the steel plate for the appellant. The Court is as capable as the appellant of visioning the material benefit these performances by the appellant and its assignors brought to the United States when the officers requisitioned the producing capacity of the Allegheny Steel Company's plant.

These benefits, which the appellant had purchased and the returns from which it was due to receive from the Allegheny Steel Company, were as verily taken by the United States as though the officers of the United States had caused to be substituted in the appellant's contract with the Steel Company the name of the United States wherever there appeared the name of the appellant.

Not only, however, did the officers of the United States take the benefits for which the appellant had paid, but they destroyed whatever benefit there was in the rights which the appellant had in its contract, saving only the right to be fairly compensated for its loss. From the appellant was taken the use, possession and disposal of the steel plates it had a right to receive from the Steel Company and which it had already sold. With that went the entire material benefit of all the appellant's rights under its contract. What had been valuable, worth nearly a million dollars, was gone; taken for the public use; lawfully taken, yes, but lawfully compensated for, no.

In practically every case where the taking of intangible rights has been alleged, the plea has been made by the sovereign power that it actually took nothing from the owner; often that it received no benefit from the owner's loss. A good deal of loose thinking has been cloaked

under the charge that the injuries were "consequential." These arguments, or their equivalent, were raised in the two leading cases of *Pumpelly* v. *Green Bay & Mississippi Canal Co.*, 13 Wall. 166, and *United States* v. *Lynah*, 188 U. S. 445. Yet the decisions in those cases stand for the proposition that, where real property, while not actually reduced to possession by the Government, has necessarily had its actual usefulness destroyed by reason of the exercise of the power of eminent domain, a taking has resulted and compensation is due. These conclusions are built upon the principle that, where the sovereign power considers the general result to be accomplished is for the public good, the interest of the individual which must be sacrificed for the community purpose is to be measured, not by the direct value to the public, but by the value to the individual of the right taken. This, it is submitted, is the universal doctrine.

Monongahela Navigation Co. v. *United States*, 148 U. S. 312, announced the proposition that, where an exercise of the sovereign power of appropriation at the same time necessarily destroys the value to the owner of an intangible contract right which depends for its value upon the free use, possession and disposition of the tangible property upon which it is founded, there also we have a taking of property for which compensation must be made.

In *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, a water company was possessed of its physical equipment, franchises to operate, and in addition a contract with the city to supply the city with water. See also Award of the Tribunal of Arbitration between the United States of America and the Kingdom of Norway, under the special agreement of June 30, 1921, p. 31; *Cornwall* v. *Louisville & Nashville R. R. Co.*, 87 Ky. 72; *Trustees* v. *Atlanta*, 93 Ga. 468; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390; *West River Bridge* v. *Dix*, 6 How. 507; *Richmond, etc., R. R. Co.* v. *Louisa*

R. R. Co., 13 How. 71; *Greenwood* v. *Union Freight R. R. Co.*, 105 U. S. 13.

Where A is the owner and B the lessee, an appropriation by the State of A's property is a taking of B's property and B must be compensated as well as A. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Inlots*, Fed. Case No. 15,441a; *Matter of City of New York*, 120 App. Div. 700. A lessee is entitled to compensation when by the appropriation of the freehold his right of renewal is destroyed. *Matter of City of New York*, 118 App. Div. 865, affd. 189 N. Y. 508. Here we have a value in the lessee which is over and above the total value of the property; and no attention paid the city's contention that it does not seek to use the lessee's property.

An even closer analogy is to be found in *Meade* v. *United States*, 2 Ct. Clms. 224; *Gray* v. *United States*, 21 Ct. Clms. 340; and *Cushing* v. *United States*, 22 Ct. Clms. 1. In these cases the claimants were the owners of valid claims against foreign governments which this Government surrendered by treaties. See also *Morris Canal & Banking Corporation* v. *Townsend*, 24 Barb. 658.

The facts are that the United States seized the appellant's rights to priority in a definitely assigned portion of the entire manufacturing capacity of the Allegheny Steel Company for the year 1918, and then devoted that capacity to producing the very same plates of steel for which the appellant had contracted, and produced this steel from the very raw material which had been purchased by the Steel Company for the performance of the appellant's contract,—a purchase which had been made possible by reason of the appellant's performance of its initial obligation under the contract. We stand upon the proposition that the United States, by reason of prohibiting the performance of the appellant's contract with the Steel Company and devoting the manufacturing capacity of the plant for 1918 to the purposes of the United States,

took for the public use the property of the appellant; that the United States received a benefit from this property of the appellant; and that, whether or not it received such benefit, the destruction of the appellant's rights by the action of the United States constituted a taking, within the meaning of the Fifth Amendment, and compensation should be made therefor.

If the property right existed, and if it was taken for public use, then, on the authority of the following cases, the United States is under an implied contract to pay reasonable compensation. *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *Hollister* v. *Benedict & Burnham Mfg. Co.,* 113 U. S. 59; *United States* v. *Palmer,* 128 U. S. 262; *United States* v. *Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552.

Mr. Assistant Attorney General Riter, with whom *Mr. Solicitor General Beck* and *Mr. H. L. Underwood* were on the brief, for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value and if carried out would have produced large profits.

In October, 1917, before any deliveries had been made, the United States Government requisitioned the Steel Company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the Steel Company would be taken over and operated for the public use.

Appellant brought an action in the Court of Claims alleging, in addition to the foregoing, that by the orders

of the Government the performance of the contract by the Steel Company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the Steel Company and thereby appropriate for public use appellant's property in the contract. As a result it alleged that it had incurred losses in a large sum which it sought to recover, as just compensation, by virtue of Article V of the Constitution. To this petition the United States interposed a demurrer, which was sustained and the petition dismissed. From this judgment the case comes here by appeal.

A question is raised as to the statutory authority of the officer, who made the order of requisition and gave the directions respecting non-compliance with the contract, to bind the Government, but, for the purposes of the case, we assume he was authorized, as he could have been under 39 Stat. 1193, c. 180; or 40 Stat. 182–183, c. 29. We also pass, without deciding, a contention challenging the sufficiency of the complaint and come to the case on the merits.

The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, *Bowditch* v. *Boston,* 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393. There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased

cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property. See *Calhoun* v. *Massie*, 253 U. S. 170, where an act of Congress invalidating contracts made with attorneys for compensation exceeding a certain percentage for the prosecution of claims against the Government, was sustained, although it had the effect of putting an end to an existing contract. This Court said (pp. 175–176):

"An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results. *Lottery Case*, 188 U. S. 321, 357; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 58; *Hoke* v. *United States*, 227 U. S. 308, 323; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146. The sovereign right of the Government is not less because the property affected happens to be a contract. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 484; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372."

In *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, it was held that an act of Congress, prohibiting the issuance of free transportation by interstate common carriers which invalidated a contract for transportation previously entered into and valid when made, did not have the effect of taking private property without compensation. The Court, speaking through Mr. Justice Harlan, said (p. 484):

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox* v. *Lee*, 12 Wall. 457, above cited, the court, refer-

ring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts.'"

The conclusion to be drawn from these and other cases which might be cited is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 583–585, 592–593. If, under any power, a contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable. What was here requisitioned was the future product of the Steel Company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, *ipso facto,* took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. "It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." *Dartmouth College* v. *Woodward,* 4 Wheat. 629, 656. Plainly, here there was

no acquisition of the obligation or the right to enforce it. If the Steel Company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract but enforcement of the statute. If the Government had failed to pay for what it got what would have been the right of the Steel Company? Not to the price fixed by the contract but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

Parties and a subject-matter are necessary to the existence of a contract, but neither constitutes any part of it—the contract consists in the agreement and obligation to perform. If one makes a contract for the personal services of another or for the sale and delivery of property, the Government, by drafting one of the parties into the army, or by requisitioning the subject-matter, does not thereby take the contract. In *Marshall* v. *Glanvill*, [1917], 2 K. B. 87, the plaintiff had been employed by the defendants upon a contract of service. While the agreement was in force the former was called into the military service. It was held that this put an end to the contract. The court said:

"Here the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end."

The American and English cases all agree that the result is the same where the subject-matter of the contract

is requisitioned. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, 629-631; *The Claveresk*, 264 Fed. 276, 282-284; *The Frankmere*, 262 Fed. 819, 822; *In re Shipton, Anderson & Co.* [1915], 3 K. B. 676; *Steamship Co.* v. *Le Nickel Societé Anonyme*, 8 British Ruling Cases, 546; *Bank Line, Limited*, v. *Arthur Capel & Co.* [1919], A. C. 435, 445.

In *The Frankmere, supra*, where a ship under charter was requisitioned by the British Government, the court said that

". . . the contract was thereby frustrated when the government took possession of the ship, and the rights of the charterer were absolutely ended and terminated, and those of the owner, subject, however, to the paramount power of the government to use the ship, without consulting the desire of the owner, revived, as though the charter had never been entered into."

In *In re Shipton, Anderson & Co., supra*, a parcel of wheat then lying in a warehouse was sold, for future payment and delivery. The wheat was subsequently requisitioned by the English Government, and, in consequence, the sellers were unable to deliver. A claim for damages was put forward against the sellers, but the Court of King's Bench Division held that they were not liable, upon the ground that performance had become impossible without their fault. Darling, Justice, agreeing with the opinion of Lord Reading, said (pp. 683–684):

"If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract

has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it."

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.

The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

There is nothing in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, or in the other cases cited by appellant, which in any way conflicts with what we have said.

In the *Monongahela Case* the property which was taken was a lock and dam, built by the company, pursuant to the invitation of the United States and the State of Pennsylvania, the latter, in consideration, giving the company a franchise to exact tolls. The franchise, therefore, was not merely a contract in respect of the property taken, but was an integral part of it, and this Court (p. 329) said:

"So, before this property can be taken away from its owners, the whole value must be paid; and the value depends largely upon the productiveness of the property, the franchise to take tolls."

The lock and dam constituted, in effect, a going concern, whose value was of course affected by what it would produce. Moreover, the case rested primarily upon the doctrine of estoppel, as this Court has in several cases since

pointed out. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 264; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82.

In *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, the statute providing for condemnation expressly included contracts, and these were in fact taken and compensation therefor specifically allowed. This was pointed out in the opinion of this Court (p. 691):

"In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value."

We have examined the other cases relied upon but find nothing to justify a conclusion other than that which we have reached.

The judgment of the court below is

Affirmed.